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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 946

BEECH-NUT LIFE SAVERS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Beech-Nut Life Savers, Inc. ("Beech-Nut") petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinions Below

The opinion of the Court of Appeals (App. 2)[1] has not yet been officially reported. The prior opinion of the United States District Court for the Southern District of New York (App. 14) is reported at 274 F. Supp. 432.

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[1] References to "App." designate the Appendix to this Petition. References to "R." designate the Record.

Jurisdiction

The judgment of the Court of Appeals (App. 1) was entered on December 3, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1964).

Questions Presented

1. Whether the rule promulgated by the National Labor Relations Board requiring an employer to furnish a list of the names and addresses of its employees prior to each representation election is invalid because, in promulgating the rule, the Board failed to comply with the mandatory rule making requirements of the Administrative Procedure Act.

2. Whether the Board has power to subpena material which is neither evidence nor testimony, in order to assist the Board in conducting representation elections, and whether the district courts have jurisdiction to enforce such subpenas, even though the National Labor Relations Act authorizes the issuance and enforcement only of subpenas which seek "evidence" or "testimony."

Statutes Involved

This case involves sections 6 and 11 of the National Labor Relations Act, 29 U.S.C. §§ 156 & 161 (1964), and portions of the Administrative Procedure Act, 5 U.S.C. §§ 551, 553 (Supp. III, 1965-67). These provisions are set forth at App. 61.

Statement of the Case

This action is one of several arising from the rule promulgated by the Board in *Excelsior Underwear, Inc.* 156 N.L.R.B. 1236 (1966) (App. 41). The Board announced

in the *Excelsior* case that in every future representation election employers would be required to file with the Board a list containing (or records showing) the names and addresses of all employees in the bargaining unit, which would be turned over by the Board to all unions participating in the election, for use by them in furtherance of their election campaigns. Beech-Nut was not a party to the *Excelsior* case in which this new rule was promulgated, and was given no opportunity to be heard prior to the rule's adoption. The rule was nevertheless summarily applied to Beech-Nut in this case.

On February 18, 1966, the Office & Professional Employees International Union, Salesmen's Division, Local 153, AFL-CIO ("Local 153"), petitioned the Board for a representation election to be held among certain of Beech-Nut's salesmen. Two other unions intervened in the proceeding. The Board's Regional Director for the Second Region issued a Decision and Direction of Election to be conducted among all salesmen employed by Beech-Nut in the greater metropolitan New York City area, and he ordered Beech-Nut to file with the Board's New York office, in accordance with the *Excelsior* rule, a list containing the names and addresses of all eligible voters in the bargaining unit, to be made available to the three unions participating in the election. (See R. 3a). Based on its belief that the *Excelsior* rule was invalid and that the Board's order was improper, Beech-Nut declined to comply.

The Board determined to conduct the election without the production of the list of names and addresses. The election was held on July 21, 1966, and the employees voted against union representation by a substantial margin. (See

R. 11a). Local 153 filed an objection to the election on the ground that Beech-Nut had not complied with the *Excelsior* rule. (See R. 12a).

On August 9, 1966 Beech-Nut filed an answer to Local 153's objection, setting forth grounds for Beech-Nut's belief that the first election was valid. (R. 5a). The next day the Regional Director issued a Supplemental Decision and Report on Objections, invalidating the election on the ground that Beech-Nut had not complied with the *Excelsior* rule. (R. 10a). The Regional Director thereafter issued a Second Supplemental Decision and Report on Objections (R. 15a), in which he directed that an *Excelsior* list be filed by Beech-Nut within seven days after the issuance of a Notice of Second Election. The Board denied Beech-Nut's request for review. (R. 19a). Thereafter, the two intervening unions withdrew from the ballot.

The Regional Director then issued a Notice of Rerun Election, and directed Beech-Nut to provide the employees' names and addresses, to be made available to Local 153. (R. 20a). Beech-Nut replied that the first election was valid, and that the *Excelsior* rule was invalid, and it respectfully declined to furnish the requested list. (R. 21a).

A "subpena *duces tecum*" seeking to enforce the *Excelsior* rule was served on Beech-Nut. (App. 26). In accordance with Board regulations, Beech-Nut petitioned to revoke the subpena. (R. 25a). The petition argued, among other things, that the promulgation of the *Excelsior* rule failed to comply with the rule making requirements of the Administrative Procedure Act; and that the Board's subpena was invalid because it did not seek the production of evidence or testimony, and therefore exceeded the subpena power granted to the Board by the National Labor

Relations Act. The Board denied the petition. (R. 33a). The Board then brought this action in the district court, seeking an order pursuant to section 11(2) of the National Labor Relations Act, 29 U.S.C. § 161(2) (1964), enforcing the subpena, or in the alternative a mandatory injunction directing Beech-Nut to furnish the employees' names and addresses as required by the *Excelsior* rule.

On September 18, 1967, the district court rendered its decision enforcing the subpena. The district court held that the *Excelsior* rule was valid. It held that the Board can make rules in adjudications without complying with the procedures mandated by the Administrative Procedure Act for rule making. It held also that the district courts can, under the National Labor Relations Act, enforce a subpena seeking the information required by the *Excelsior* rule. The district court rejected other contentions of Beech-Nut which are not presented here for review. Beech-Nut appealed, and the Court of Appeals affirmed the judgment of the district court. Since both courts found the subpena enforceable, they did not rule on the Board's alternative request for a mandatory injunction.

Reasons for Granting the Writ

The decision of the Court of Appeals in this case as to the validity of the *Excelsior* rule is in direct conflict with the decision of the Court of Appeals for the First Circuit in *Wyman-Gordon Co.* v. *NLRB,* 397 F.2d 394, *cert. granted,* No. 463 (U.S. Nov. 12, 1968) (App. 28). The Court having granted certiorari in *Wyman-Gordon,* petitioner respectfully requests that certiorari be granted in this case so that petitioner may be heard by this Court before the important, unsettled question as to the validity of the *Excelsior* rule is determined. In addition, this case

also squarely presents a question as to the availability of a subpena to enforce the *Excelsior* rule, a question not directly raised in *Wyman-Gordon,* but one which the Solicitor General there urged the Court to consider because of its importance. See Petition for Certiorari, pp. 11-12, *NLRB* v. *Wyman-Gordon Co., supra.* The grant of certiorari here would permit consideration of both these important issues which have arisen in the increasing volume of litigation over the *Excelsior* rule, and would permit final determination of these matters.

1. *Conflict among circuits as to invalidity of* Excelsior *rule.* In *Wyman-Gordon* the First Circuit held that the *Excelsior* rule was promulgated in violation of the rule making requirements of the Administrative Procedure Act ("A.P.A."). In the petition for certiorari in that case (at p. 2), the Solicitor General phrased the question presented to this Court as whether the *Excelsior* rule "is invalid because the agency promulgated it in an adjudicatory proceeding rather than under the rule making procedures of the Administrative Procedure Act." That question is the same one presented here.

In the instant case, the Second Circuit noted that Beech-Nut's position as to the invalidity of the *Excelsior* rule under the A.P.A. was supported by the *Wyman-Gordon* decision, and the court expressly stated its disagreement with that decision. See App. 9. Accordingly, there is a clear conflict between the First and Second Circuits on the question here presented as to whether the *Excelsior* rule was promulgated in violation of the rule making requirements of the A.P.A.[2]

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[2] The Ninth Circuit, in a recent decision, agreed with the Second Circuit on this point. *British Auto Parts, Inc.* v. *NLRB,* CCH Lab. Cas. ¶13,134 (9th Cir. Dec. 17, 1968).

2. *Importance of question as to invalidity of* Excelsior *rule.* Certiorari should be granted for the additional reason that the Court of Appeals decided an important question of federal law which has not been, but should be, settled by this Court. The holding of the Court of Appeals that the Board, when promulgating a "rule" as defined in the A.P.A., need not follow the procedure prescribed by that Act for "rule making," is erroneous and seriously undermines the fundamental purposes of the A.P.A.

a. The Board announced in the course of its decision in the *Excelsior* case a comprehensive, substantive rule of general applicability to govern all future representation elections. The rule was not made applicable to the facts or parties in *Excelsior,* and it provided in detail for a variety of possible future fact situations, although they were not raised by the facts in the *Excelsior* case. In promulgating this rule, the Board clearly engaged in rule making within the meaning of the A.P.A. The Board failed, however, to conduct a rule making proceeding so as to comply with the requirements for rule making which are mandated by the A.P.A. Rather, the Board took occasion to promulgate its new rule in a nominally adjudicatory proceeding. This procedure violated the A.P.A.

Power to make rules is conferred upon the Board by section 6 of the National Labor Relations Act ("N.L.R.A."), 29 U.S.C. § 156 (1964), which provides:

> "The Board shall have authority from time to time to make, amend, and rescind, ***in the manner prescribed by the Administrative Procedure Act,*** such rules and regulations as may be necessary to carry out the provisions of this Act."[3]

[3] Emphasis has been supplied in this Petition except where otherwise noted.

The A.P.A. defines "rule" and "rule making" as follows:

> "'[R]ule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ; 'rule making' means agency process for formulating, amending, or repealing a rule . . . ."

5 U.S.C. §§ 551(4)-(5) (Supp. III, 1965-67).

The procedures to be followed in "rule making" are set forth in 5 U.S.C. § 553 (Supp. III, 1965-67), which requires notice of proposed rule making, a hearing to interested persons and publication of the rule.

The meaning of these provisions of the N.L.R.A. and the A.P.A. is clear. Congress has authorized the Board to make rules, but when it makes rules it must do so in the manner prescribed by the A.P.A., which requires notice of the proposed rules, a hearing, and publication.

There has been no dispute in this case that the Board's pronouncement in *Excelsior* was a "rule" as that term is defined by the A.P.A. It was a statement of "general applicability" and "future effect" designed to "prescribe law." It was a quasi-legislative pronouncement governing all future elections, dealing with all fact situations which the Board thought might arise in the future, and not made applicable to the parties and the facts in the *Excelsior* case in which the rule was announced.[4]

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[4] For example, the Board provided that in cases when the payroll period for voting eligibility purposes is subsequent to the direction of election, the list of employees' names and addresses must be filed within 7 days after the close of the payroll period; it provided that the rule should apply to decertification proceedings; it made an exception to the rule in the case of expedited elections; and it provided that there should be no exceptions in various other situations. See 156 N.L.R.B. at 1240 n.5, 1242 n.14, 1246 (App. 47, 51, 58). None of these provisions arose out of the facts in *Excelsior*.

The Board, however, did not follow the A.P.A. procedure for making rules. Rather, the Board announced its rule in the course of an adjudication, pursuant to a novel procedure whereby certain parties, selected by the Board, were invited to file briefs *amicus curiae* and to participate in oral argument. See 156 N.L.R.B. at 1238 (App. 45).

The Court of Appeals held that the Board's failure to comply with the statutory rule making requirements was permissible. The court held that even though the *Excelsior* rule might be a "rule" as defined by the A.P.A., "the procedure it [the Board] chooses to follow in resolving any particular problem is for the Board, in its informed judgment, to decide." App. 7.

The court below thus held that an administrative agency may determine for itself whether it will comply with the congressional requirements for rule making. Under this view, it is the *procedure* chosen by the agency as the vehicle for announcing rules, *i.e.*, a rule making proceeding or an adjudication, which determines whether the agency must comply with the A.P.A.'s requirements for the promulgation of rules; the agency's choice of an adjudicative forum forecloses further judicial inquiry.[5] This conclusion misconceives the meaning of the A.P.A. Under the A.P.A. it is the *substance* of agency action, *i.e.*, whether the agency is promulgating a "rule" within the meaning of the A.P.A. or entering an order, which determines the

[5] The Second Circuit noted that an agency's choice of an adjudicative forum to make a rule might be improper if the rule is "completely unrelated" to the facts and issues of the adjudication in which it is announced. See App. 9. This approach would permit an agency to announce in adjudications all of its general, legislative rules, without affording notice and a hearing to interested parties, so long as the agency can find an adjudication having some relationship to the subject matter of each of the contemplated rules.

procedure to be followed. The requirements of notice, hearing and publication are made applicable to "rule making," which is defined as the formulation of a "rule." 5 U.S.C. §§ 551 (4)-(5), 553 (Supp. III, 1965-67). When an agency makes a "rule" it must comply with these requirements, irrespective of the occasion selected by the agency to announce the rule.

Thus, in *Chicago, B. & Q.R.R. v. United States,* 242 F. Supp. 414 (N.D. Ill. 1965) (three-judge court), *aff'd per curiam sub. nom., Chicago & N.W. Ry. v. Chicago B. & Q.R.R.,* 382 U.S. 422 (1966), it was held that the Interstate Commerce Commission, in altering its rule known as the "Ratebreak System," had engaged in rule making, *even though the Commission had acted in an adjudicative proceeding,* and that the Commission's failure to comply with the requirements of the A.P.A. rendered the rule invalid.

b. As support for its holding that the procedure to be followed in making rules is for the Board to decide, the Court of Appeals cited *SEC* v. *Chenery Corp.,* 332 U.S. 194, 202-03 (1947). Reliance on *Chenery* was erroneous. In *Chenery,* the Commission issued an order, in an adjudication, denying approval of a plan of reorganization which would have permitted corporate management to profit as a result of purchases of the corporation's stock during the reorganization. The parties in the case were members of the management who had traded in the corporation's stock, and the Commission's order adjudicated the legality of their actions. The argument of the management in this Court was that the agency lacked power to make a retroactive adjudicative order; that in the absence of a general rule the agency *had* to approve

the plan of reorganization involved in the adjudication and could only enunciate new standards of conduct by promulgating a rule of general applicability for the future. The Court rejected that argument. The Court held it appropriate for the Commission to apply such new standards to adjudicate the issues in the case. The Court noted that to hold otherwise would have left the agency powerless to deal with new situations presented by the parties or facts in individual cases.

Chenery thus did not deal with the question presented here as to the power of an agency to make a general rule in an adjudication to which the rule does not apply, and to apply that rule to persons who were not parties to the adjudication and who had no notice or hearing prior to the formulation of the rule. *Chenery* simply held that the absence of a general rule as to management trading during a reorganization did not affect the Commission's power and duty to adjudicate "in relation to the particular proposal before it." 332 U.S. at 201. The agency in *Chenery*, unlike the Board here, did not purport to promulgate a general rule in the course of an adjudication. Indeed, the position of the Commission in *Chenery* was "that no such rule or standard would be fair and equitable in all cases." 332 U.S. at 215 (dissenting opinion).

Thus, while the Court in *Chenery* noted (p. 203) that the choice between proceeding by rule or by *ad hoc* litigation lies primarily in the discretion of the agency, that is not the issue presented here. The question here is rather whether an agency can proceed by promulgation of a general rule and avoid the statutory rule making requirements simply by announcing its rule in the course of an adjudication to which it does not apply. That question has not previously

been determined by this Court adversely to Beech-Nut's position here.[6]

c. Even assuming, *arguendo*, that the procedure to be used in the making of rules is within the informed discretion of the Board, the Board has abused its discretion. In the administration of its responsibilities the Board does not make an informed choice as to when to proceed by rule making and when to proceed by adjudication. Rather, it has been the Board's policy never to conduct a rule making proceeding.[7]

The Board's violation of the A.P.A. in *Excelsior* caused real and substantial procedural unfairness to Beech-Nut. Because the Board refused to conduct a rule making proceeding, Beech-Nut was given no opportunity to be heard on the factual and legal matters there involved. And when Beech-Nut presented its objections to the Board's action in this case, they were summarily rejected as having been foreclosed by the *Excelsior* rule. The failure of the Board to comply with the requirements of the A.P.A. in the formulation of the *Excelsior* rule thus effectively deprived Beech-

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[6] The Court in *Chenery* specifically noted the importance of rule making proceedings, stating:

> "Since the [Securities and Exchange] Commission, unlike a court, does have the ability to make new law prospectively through the exercise of its rule making powers, it has less reason to rely upon *ad hoc* adjudication to formulate new standards of conduct. . . . The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future." 332 U.S. at 202.

[7] See 1 Davis, *Administrative Law Treatise* § 6.13 (1965 Pocket Parts). The Board has been criticized for this practice. See generally Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards* 145–47 (1962); Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 Yale L.J. 729 (1961); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921 (1965).

Nut of any opportunity to present its objections and be fairly heard.

A rule making proceeding in *Excelsior* would have permitted all parties affected by the *Excelsior* rule, including employers, employees and unions, to be heard prior to the formulation of the rule. But the Board refused to grant the opportunity for a hearing to all interested parties as required by the A.P.A. and it persisted in its undeviating refusal to conduct rule making proceedings. The Board's action constituted arbitrary and capricious agency action, which can be remedied by this Court. 5 U.S.C. § 706(2)(A) (Supp. III, 1965-67).

3. *Importance of question as to lack of power to issue or enforce the subpena.* Even if this Court were to conclude that the *Excelsior* rule was properly promulgated, the question remains whether compliance with the rule may be compelled by issuance of a subpena and enforcement of that subpena by a district court. The Court of Appeals held that such a subpena was proper, and that it could be enforced by the district court. Beech-Nut respectfully submits that the Court of Appeals erred in this conclusion.

The N.L.R.A. clearly restricts the permissible scope of Board subpenas to the production of "evidence" or "testimony." Section 11(1) of the Act, 29 U.S.C. § 161(1) (1964), provides:

> "The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any *evidence* of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceeding, forthwith issue to such party *subpenas*

> *requiring the attendance and testimony of witnesses or the production of any evidence* in such proceeding or investigation requested in such application."

In the event of a refusal to obey a Board subpena, Section 11(2) of the N.L.R.A. gives the district courts jurisdiction to order the person subpenaed to appear "to produce *evidence* if so ordered, or . . . to give *testimony* touching the matter under investigation or in question . . . ."

The plain meaning of the statute is that the Board has power to issue, and the district courts have jurisdiction to enforce, only those subpenas which seek the production of "evidence" or "testimony." The essence of evidence is proof. See, *e.g., Black's Law Dictionary* 656-57 (4th ed. 1951); *Webster's Third New Int'l Dictionary* 788 (1963). The determination of whether or not subpenaed information is "evidence" turns on whether the information tends to prove the truth or falsity of a matter in question. The information sought here, the names and addresses of the employees in the bargaining unit, is not sought as proof. The purpose of the subpena is to enable a union to communicate with employees in furtherance of its election campaign.

When information is sought by the Board not as evidence, but for some other purpose, a subpena is not available. Thus, in *Goodyear Tire & Rubber Co.* v. *NLRB*, 122 F. 2d 450 (6th Cir. 1941), the court denied the Board access to a card index of employees where the Board asked for the cards "not as evidence, but in order to facilitate the examination of other data." *Id.* at 453.

The Second Circuit held here that the subpena was proper since it was designed to "assist" the Board in fulfilling its duty to investigate questions of representation and supervise representation elections. App. 13. Assist-

ance to the Board is not, however, a relevant criterion under the statute. There is no basis for reading the statutory requirement as to "evidence" as encompassing all matters which would assist the Board in its administrative functions with respect to elections. This is an impermissible rewriting of the statute.

If Congress had intended to grant the Board an all-encompassing power to demand any information which might aid the Board in its functions, it could have done so by language to that effect. Indeed, the original draft of the N.L.R.A. did give the Board a broad investigatory power to require production of materials "which the Board deems relevant or material to the inquiry." S. 2926, 73d Cong., 2d Sess. § 208(1) (1934). The final version, however, removed this broad authorization and limited the Board to demanding only "evidence" or "testimony."

In comparable statutes, where Congress has seen fit to grant to an administrative agency broad powers of access to information, it has made its intention clear. In the Railway Labor Act, for example, enacted *before* the N.L.R.A., Congress granted the National Mediation Board broad powers to obtain information necessary to perform its function of determining employee representatives of carriers. Congress, however, used the following language in so doing:

> "The [National Mediation] Board shall have access to and have power to make copies of the books and records of the carriers *to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.*"

Railway Labor Act § 2, Ninth, 45 U.S.C. § 152, Ninth (1964). Congress chose not to use such language in the N.L.R.A. The limitation of section 11 to "evidence" cannot be construed as granting the Board an unlimited

subpena power to seek all information which might assist the Board in its functions.

In holding that, despite the non-evidentiary nature of the information sought, a subpena was proper process to compel compliance with a substantive Board rule, the Court of Appeals decided a second important question of federal law which has not been, but should be, settled by this Court. As previously stated, the Solicitor General has asked the Court to consider the subpena question in *Wyman-Gordon,* even though it was not reached in that case because of the First Circuit's holding that the *Excelsior* rule was invalid. See Petition for Certiorari, pp. 11-12, *NLRB* v. *Wyman-Gordon Co., supra.* The Solicitor General noted that "it would be appropriate for this Court to decide . . . [the subpena question] in order to put an end to the increasing volume of litigation that has developed over the *Excelsior* principle." *Id.* at 11.[8]

The subpena question is squarely presented in this case. The grant of Beech-Nut's petition for certiorari would properly present to this Court both of these issues which have arisen in litigation as to the *Excelsior* rule, and would permit final determination of these matters.

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[8] Judge Coffin, even though dissenting in *Wyman-Gordon* on the ground that he found the *Excelsior* rule to have been properly promulgated under the A.P.A., nevertheless stated that he was sympathetic with the courts which have held that an *Excelsior* list is not "evidence" which can be subpenaed under the N.L.R.A. He stated that courts which had upheld the subpena power as available to procure an *Excelsior* list "have tortured the concept of 'evidence' ". 397 F.2d at 399 (App. 38). At least two district courts have declined to enforce *Excelsior* subpenas, holding they did not call for the production of evidence. *NLRB* v. *Q-T Shoe Mfg. Co.,* 279 F. Supp. 1 (D.N.J. 1968); *NLRB* v. *Montgomery Ward & Co.,* 64 L.R.R.M. 2061 (M.D. Fla. 1966). Three courts of appeals have held the subpenaed material to be "evidence." *British Auto Parts, Inc.* v. *NLRB,* CCH Lab. Cas. ¶13, 134 (9th Cir. Dec. 17, 1968); *NLRB* v. *Rohlen,* 385 F.2d 52 (7th Cir. 1967); *NLRB* v. *Hanes Hosiery Div.,* 384 F.2d 188 (4th Cir. 1967), *cert. denied,* 88 S. Ct. 1041 (1968).

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of December, one thousand nine hundred and sixty-eight.

Present: HON. J. EDWARD LUMBARD,
Chief Judge,
HON. STERRY R. WATERMAN,
HON. IRVING R. KAUFMAN,
Circuit Judges.

NATIONAL LABOR RELATIONS BOARD,
Petitioner-Appellee,

v.

BEECH-NUT LIFE SAVERS, INC.,
Respondent-Appellant.

Appeal from the United States District Court for Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered adjudged, and decreed that the judgement of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO
Clerk

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 410—September Term, 1967.

(Argued April 10, 1968 Decided December 3, 1968.)

Docket No. 32002

NATIONAL LABOR RELATIONS BOARD,

Petitioner-Appellee,

v.

BEECH-NUT LIFE SAVERS, INC.,

Respondent-Appellant.

Before:

LUMBARD, *Chief Judge,*

WATERMAN and KAUFMAN, *Circuit Judges.*

Appellant seeks reversal of an order, United States District Court for the Southern District of New York, Bonsal, *J.*, enforcing a National Labor Relations Board subpoena *duces tecum* directed to appellant by which appellant is required to produce the information necessary to comply with the Board's so-called *Excelsior* rule, laid down in *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966).

The subpoena was issued in connection with the prefatory stages of a rerun representation election. Appellant had not timely complied with the rule when the original election had been held, and, that election having been set aside

and the rerun election ordered, refused to comply with the rule in connection with the rerun election, and, its subpoena being ignored, the Board sought district court enforcement thereof.

The disposition below, 274 F. Supp. 432, is affirmed.

RICHARD S. RODIN, Atty., NLRB, Arnold Ordman, General Counsel, Dominick L. Manoli, Assoc. Gen. Counsel, Marcel Mallet-Prevost, Asst. Gen. Counsel, Gary Green, Atty., *for Appellee.*

LEONARD JOSEPH, LESTER BERKELHAMER, LAWRENCE D. ROSS, DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD, New York City, *for Appellant.*

WATERMAN, *Circuit Judge:*

This case is here on appeal from a final judgment order of the United States District Court for the Southern District of New York granting the National Labor Relations Board's application for enforcement of a subpoena *duces tecum* directed to appellant Beech-Nut Life Savers, Inc. pursuant to Section 11(2) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519; 29 U.S.C. §§ 151 et seq.). The district court's opinion is reported at 274 F. Supp. 432. The jurisdiction of this court is invoked under 28 U.S.C. §§ 1291 and 1294.

On February 18, 1966, Office & Professional Employees International Union, Salesmen's Division, Local 153, AFL-

CIO (Local 153), petitioned the Board for a representation election to be held among certain of the appellant's salesmen. Two other unions, District 65, Retail, Wholesale and Department Store Union, AFL-CIO, and Joint Organizing Committee of Locals 342, 400, 467, 474, and 489, Amalgamated Meat Cutters & Food Employees Union, AFL-CIO, intervened in the proceeding. The Regional Director for Region 2, New York City, on April 14, 1966, ordered that an election by secret ballot be conducted among the affected salesmen of appellant. In his Direction of Election the Regional Director ordered appellant, among other things, to comply with the rule announced by the Board in *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966).

The Board's *Excelsior* rule requires an employer to file with the Board's Regional Director a list of the names and addresses of all employees eligible to vote in a representation election within 7 days after the Director's direction of an election or after the close of a payroll period determinative for eligibility purposes, whichever is later. This list is made available to all parties participating in the representation proceeding in order to facilitate the communication of election issues to the employees and the prompt resolution of questions relating to the voting eligibility of particular employees. The *Excelsior* rule also provides that an employer's failure to file the required list is ground for setting the election aside whenever proper objections to the election are filed.

Appellant failed to file the *Excelsior* list. On July 20, 1966, one day before the scheduled election, the company submitted a list of names of the voters but without addresses.

On July 21, 1966, an election was conducted in which 88 votes were cast for Local 153, 3 votes for one of the intervening unions, no votes for the other intervening union, and 135 votes against representation by any union. Local 153 filed objections to the election because appellant had not complied with the *Excelsior* rule.

The Regional Director sustained the Local's objections, set aside the election, and ordered a second election. Appellant maintained that the July 21 election was a valid one, attacked the validity of the *Excelsior* rule and the impropriety of the Board's insistence upon compliance with the Rule in this representation proceeding. In the meantime the two intervening unions were permitted to withdraw from participation in the second election.

On November 29, 1966, the Regional Director issued a Notice of Rerun Election and notified the Company by letter that it had until December 7, 1966 to submit an *Excelsior* list. In a letter dated December 5, 1966 appellant refused to supply the *Excelsior* list. Because of appellant's continued refusal to furnish an *Excelsior* list, the second election was indefinitely postponed by the Regional Director.

On December 13, 1966, the Regional Director caused a subpoena *duces tecum* to be issued, pursuant to Section 11(2) of the Act, directing the appellant to produce and make available to the Board's Regional Office the appellant's personnel payroll records or, in lieu thereof, a list containing the names and addresses of all employees eligible to vote in the election. The appellant refused to

comply with the subpoena or otherwise furnish the list and petitioned to have the subpoena revoked. The Board denied appellant's petition and applied in the district court for enforcement of the subpoena, or, alternatively, for a mandatory injunction directing the appellant to comply with the *Excelsior* rule. Jurisdiction was based on Sections 11(2) and 9(c) of the National Labor Relations Act, and on 28 U.S.C. § 1337. The district court upheld the *Excelsior* rule, refused to review the validity of the first election and entered judgment on November 1, 1967. It granted enforcement of the Board's subpoena. It also ordered that the appellant should, within seven days of the receipt of a notice from the Regional Director that a second election was to be held, forward the subpoenaed information to the Director. The court found it unnecessary to issue the alternatively requested mandatory injunction. This appeal followed.

Appellant's main contention is that the Board's *Excelsior* rule, regardless of whether the rule is a desirable or an undesirable one, is invalid and unenforceable because it was not promulgated in the manner required by the applicable provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551-553. This contention is supported by two separate arguments. Appellant's first argument is that rules of general applicability and future effect, 5 U.S.C. § 551(4), such as the *Excelsior* rule, can only be promulgated after *quasi-legislative* agency proceedings which condealing with quasi-legislative agency rule-making, 5 U.S.C. form with the Administrative Procedure Act's provisions §§ 551-553; and, that only "orders," 5 U.S.C. § 551(6),

which are applied to the particular case before the agency can be formulated in *quasi-judicial* agency proceedings. 5 U.S.C. § 551(7). Appellant's second argument is that, even if rules of general applicability and future effect can be formulated in the course of a quasi-judicial agency proceeding, the agency must be adjudicating the rights of parties before the agency when the rules are formulated, and that this was not the situation when the *Excelsior* rule was announced in *Excelsior Underwear, Inc., supra.* We do not agree with appellant's analysis or with its arguments.

Appellant's first position is grounded upon too narrow an interpretation of the range of powers given to the Board and of the regulations governing the manner in which the powers delegated to it may be exercised. Basically, the Board has the authority to use either of two procedures in dealing with the specialized problems it encounters in the administration of federal labor laws. The Board can resolve a problem arising within its limited jurisdictional sphere either by quasi-legislative promulgation of general rules designed to meet the problem, National Labor Relations Act § 6, 29 U.S.C. § 156; 5 U.S.C. §§ 551-553; or in quasi-judicial proceedings when the problem arises as an issue in a case before the Board, National Labor Relations Act § 6, 29 U.S.C. § 156; 5 U.S.C. §§ 554, 556, 557. The procedure it chooses to follow in resolving any particular problem is a matter for the Board, in its informed judgment, to decide. E.g., *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202-03 (1947); *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344 (1953); *NLRB* v. *Penn Cork*

and Closures, Inc., 376 F.2d 52, 57 (2 Cir. 1967); *NLRB* v. *A.P.W. Products Co.*, 316 F.2d 899 (2 Cir. 1963).[1]

Strictly construed, the Administrative Procedure Act could be interpreted as limiting all agency rule making to quasi-legislative proceedings. However, we do not believe Congress intended that the Act should be so strictly construed. Congress, in giving the National Labor Relations Board quasi-judicial powers, "cannot have been blind to the fact that the adjudicative process of the agencies, like that of the courts, gives birth to 'rules,' which may apply for the past, for the future, or, more generally, for both. . . ." *NLRB* v. *A.P.W. Products Co., supra* at 905; see *Wyman-Gordon Co.* v. *NLRB*, 397 F.2d 394 (1 Cir. 1968), cert. granted, 37 L.W. 3177 (U.S. Nov. 12, 1968); *cf.* National Labor Relations Act § 14(c)(1), 29 U.S.C. § 164 (c)(1).[2] Therefore we hold that either of the congression-

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[1] The NLRB has been criticized in the past both by this court, see, e.g., *NLRB* v. *Majestic Weaving Co.*, 355 F.2d 854 (2 Cir. 1966); *NLRB* v. *Penn Cork and Closures, Inc.*, 376 F.2d 52 (2 Cir. 1967), and by legal commentators, see, e.g., 1 Davis, Administrative Law Treatise § 6.13 at 149 (1967 Supp.); Peck, The Atrophied Rule-Making Powers of the National Labor Relations Board, 70 Yale L. J. 729, 752-761; Shapiro, The Choice of Rule-making or Adjudication in the Development of Administrative Policy, 78 Harv. L. Rev. 921 (1965), because the Board has not fully utilized its quasi-legislative rule-making powers to their full advantage. However, regardless of the fact that the courts and the commentators would prefer to see the Board employ quasi-legislative procedures more often than it has, the Board has not seen fit to proceed in this manner.

[2] Over the years a great many rules have been formulated and applied by the Board in its quasi-judicial proceedings. E.g., *Brooks* v. *NLRB*, 348 U.S. 96 (1954); *NLRB* v. *Auto Ventshade, Inc.*, 276 F.2d 303 (5 Cir. 1960); *NLRB* v. *Pittsburgh Plate Glass Co.*, 270 F.2d 167 (4 Cir. 1959), cert. denied, 381 U.S. 943 (1960); *Peerless Plywood*, 107 NLRB 427 (1953).

ally authorized proceedings can be a proper source of Board rules having general applicability and future effect.

Appellant's second argument, that the Board was not adjudicating the rights of the parties before the Board when it announced the *Excelsior* rule, is supported by a recent First Circuit decision. In *Wyman-Gordon Co.* v. *NLRB,* 397 F.2d 394 (1 Cir. 1968), the First Circuit held that the *Excelsior* rule was not properly promulgated in the course of an adjudicatory proceeding and consequently was promulgated in violation of the Administrative Procedure Act. With all due respect, we do not agree with the First Circuit.[3]

If the *Excelsior* rule had been tacked onto an opinion dealing with completely unrelated facts and issues we would be inclined to agree with the First Circuit. This was not the situation in *Excelsior,* however. In *Excelsior,* the Union, after losing a Board-directed election, filed timely objections to certain pre-election employer conduct. One objection was that the employer refused to supply a list of names and addresses of its employees. *Excelsior Underwear, Inc., supra* at 1236. The Board considered this objection and the arguments made with reference to it and in the course of its decision announced the *Excelsior* rule which was to be applied to all future representation election cases. *Excelsior Underwear, Inc., supra* at 1239. Out

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[3] The Fifth Circuit in a recent decision, *Howell Refining Co.* v. *NLRB,* —— F.2d —— (5 Cir. 1968), has also declined to follow the First Circuit's *Excelsior* ruling in *Wyman-Gordon Co.* v. *NLRB,* 397 F.2d 394 (1 Cir. 1968).

of considerations of fairness the Board decided not to apply the new election rule to Excelsior Underwear, Inc. *Excelsior Underwear, Inc., supra* at 1240, n. 5, and the union's objection was overruled. Clearly the rule announced in *Excelsior* was substantially based on the facts and issues of that case.

It is true that the new rule extended beyond the immediate facts of the *Excelsior* case and was designed to be applicable to all future representation elections, but this is not a fatal defect. On the contrary, the Board in devising a rule is not limited to the particular facts of the case presented to it for adjudication. Cf. *NLRB* v. *Seven-Up Bottling Co., supra* at 348-349. Effective administration of our federal labor laws and the sound resolution of conflicts arising in the course of administering those laws demand that the Board bring all its accumulated knowledge and experience to bear on any problem before announcing a rule designed to deal with that problem.

This second argument of appellant in support of its main contention, that the rule was not one which could be properly promulgated in a quasi-judicial proceeding, because it was not applied to the parties in the *Excelsior* case and only applied prospectively, is, as is its first argument, without merit. The National Labor Relations Board, like other agencies with quasi-judicial powers, has the power to determine that a rule change be prospective if the Board feels that fairness to the parties before it demands that this approach be followed. See *NLRB* v. *E & B Brewing Co.*, 276 F.2d 594 (6 Cir. 1960), *cert. denied,* 360 U.S. 908

(1961); cf. *Rockwell Mfg. Co., Kearney Division* v. *NLRB*, 330 F.2d 795 (7 Cir.), *cert. denied*, 379 U.S. 890 (1964); *Optical Workers' Union* v. *NLRB*, 227 F.2d 687 (5 Cir. 1955). There is nothing anomalous about a prospective change in a legal rule occurring in an adjudicatory setting. In all fairness sufficient time may be required to permit persons to change systems and modes of dealing with one another. See *Safarik* v. *Udall*, 304 F.2d 944, 949-950, n. 4 and n. 5 (D. C. Cir. 1962).

Therefore we hold that the *Excelsior* rule was not adopted in violation of the requirements of the Administrative Procedure Act.

Additionally, appellant attacks the *Excelsior* rule as being an abuse of the supervisory powers of the Board over representation elections. We find nothing in the contentions appellant advances which have not been fully and carefully considered and properly rejected either by the Board in *Excelsior Underwear, Inc., supra*, or the courts which have had occasion to examine the *Excelsior* rule. *NLRB* v. *Rohlen*, 385 F.2d 52, 55, n. 2 (7 Cir. 1967); *NLRB* v. *Hanes Hosiery Division, Hanes Corp.*, 384 F.2d 188 (4 Cir. 1967), *cert. denied*, —— U.S. ——, 88 S. Ct. 1041 (1968). There is no need to reiterate the Board's and the courts' well articulated discussions which are more than adequate to dispose of these contentions.

Appellant also maintains that the district court erred in enforcing the subpoena requested by the Board for, first, the subpoena does not call for the production of "evidence" or "testimony" as required by the National Labor Rela-

tions Act. National Labor Relations Act § 11; 29 U.S.C. § 161 (1964).[4] We do not agree.

The term "evidence," as used in this section of the National Labor Relations Act, has not been limited to formal proof of disputed facts presented in a trial-type hearing. Rather, it has been construed by the courts so as to permit the Board to subpoena data which is relevant and helpful to a matter "under investigation" or "in question." E.g., *NLRB* v. *Rohlen, supra* at 55-58; *NLRB* v. *Hanes Hosiery*

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[4] 29 U.S.C. § 161(1) reads:

§ 161. Investigatory powers of Board

For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 159 and 160 of this titie—Documentary evidence; summoning witnesses and taking testimony

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

Division, Hanes Corp., supra; but see, e.g., *NLRB* v. *Q-T Shoe Co.*, 279 F. Supp. 1 (D.N.J. 1968); see generally, Note, *The Judicial Role in the Enforcement of the "Excelsior Rule,"* 66 Mich. L. Rev. 1292 (1968). The *Excelsior* rule and the subpoenas issued in aid of the rule are designed to assist the Board in fulfilling its statutory duties to investigate questions of representation and to supervise representation elections. E.g., *NLRB* v. *Rohlen, supra; NLRB* v. *Hanes Hosiery Division, Hanes Corp., supra; Excelsior Underwear, Inc., supra.* The district court's enforcement of the Board issued subpoena was entirely proper.

Second, appellant contends that, although there had not been exact compliance with the *Excelsior* rule, there had been substantial compliance with the policies underlying it. This contention is based on the alleged fact that the unions, at the time of the challenged election, had a list of the names and addresses of all eligible employees.[5] Therefore, the appellant argues that the first election was valid, that it was improper for the Board to set aside the first election on the ground that the appellant did not comply with the *Excelsior* rule, and that it was error for the district court to enforce the Board-issued subpoena which was to be used in the allegedly improperly-directed rerun election.

On the ground that it lacked jurisdiction to do so, the district court refused to review the action of the Board in setting aside the first election, see, *Boire* v. *Greyhound,*

[5] Apparently Local 153 sent out literature to employees in which it was stated that it had a list of names and addresses of the salesmen in all of the districts comprising the bargaining unit. This list was obtained, according to Local 153, from salesmen in the unit.

376 U.S. 477 (1964). Assuming, though not deciding, that the district court did have jurisdiction to review that action of the Board, there surely was no compliance by the employer with the *Excelsior* rule. An employer-furnished list supplied the day before an election does not provide adequate time for fair scrutiny and appraisal. Even if Local 153 had timely obtained a list of employee names and addresses from sources other than appellant, such a list does not carry the same assurance of accuracy and completeness as a list obtained by an employer from the employment records. *Excelsior Underwear, Inc., supra.* Accuracy, completeness, and opportunity for scrutiny all are necessary if the policies underlying the *Excelsior* rule are to be fulfilled.

Ignoring the fact that the list appellant furnished, whether accurate or inaccurate, was not supplied within the seven day period required by the *Excelsior* rule, appellant argues that if there is any doubt as to the completeness and accuracy of the list of employees in the unions' possession the Board should have held an evidentiary hearing directed to such an inquiry before issuing an order for a rerun election. This argument is without merit. The *Excelsior* rule was designed to expedite representation elections. To force the Board to hold an evidentiary hearing each time an employer refused to supply an *Excelsior* list because the employer claimed that the union had obtained the necessary names from other sources would only impede the representation election process.

We hold that the district court committed no error in enforcing the Board-issued subpoena.

Affirmed.

Opinion of District Court

(R. 77a)

[SAME TITLE]

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BONSAL, *D. J.*

Applicant, the National Labor Relations Board (the Board), seeks an order under Section 11(2) of the National Labor Relations Act (the Act) (29 U.S.C. § 161(2)) directing the respondent, Beech-Nut Life Savers, Inc. (Beech-

Nut), to comply with a "subpena *duces tecum*" or in the alternative, an order under Section 9(c) of the Act (29 U.S.C. § 159(c)), in the nature of a mandatory injunction, directing Beech-Nut to file with the Regional Director for Region 2, New York, New York (the Regional Director) a list with the names and addresses of its salesmen eligible to vote in a representation election directed by the Board pursuant to Section 9(c) of the Act (29 U.S.C. § 159(c)). Jurisdiction is asserted under Section 11(2) of the Act, 29 U.S.C. § 161(2), and 28 U.S.C. § 1337.

On February 18, 1966 Office & Professional Employees International Union, Salesmen's Division, Local 153, AFL-CIO (Local 153) petitioned the Board for a representation election, claiming support among a substantial number of Beech-Nut's salesmen. Two other unions, District 65, Retail, Wholesale and Department Store Union, AFL-CIO (District 65), and Joint Organizing Committee of Locals 342, 400, 464, 474 and 489, Amalgamated Meat Cutters & Food Employees Union, AFL-CIO (Joint Committee), intervened in the representation proceeding to compete with Local 153 for certification as collective bargaining representative.

On April 14, 1966 pursuant to Section 9(b) of the Act, 29 U.S.C. § 159(b), the Regional Director determined that all Beech-Nut salesmen in Division 1 constituted the appropriate unit for the purpose of collection bargaining and ordered an election to determine whether the salesmen desired to be represented by any of the three unions or by no union. The Regional Director ordered Beech-Nut to file a list of the names and addresses of all salesmen eli-

gible to vote in the election (the Excelsior list), which list the Regional Director would make available to the three unions. Excelsior Underwear Inc., 156 N.L.R.B. No. 111 (1966).[1] The order stated that failure to file the list would be grounds for setting aside the election. Beech-Nut did not file the Excelsior list but on the day before the election, submitted the names (but without addresses) of its salesmen eligible to vote.

The election was conducted on July 21, 1966. Out of a total of 226 votes, 88 were cast for Local 153, 3 were cast for the Joint Committee, none were case for District 65, and 135 were cast against representation by any union. On July 26, 1966 Local 153 filed objections to the election based upon Beech-Nut's refusal to file an Excelsior list and on August 9, 1966 Beech-Nut filed an answer to the objections. On August 10 the Regional Director sustained Local 153's objections, set the election aside and directed that a second election be held. On August 26, 1966 the Acting Regional Director ordered Beech-Nut to submit an

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[1] In *Excelsior* the Board held that to assure the fairness of representation elections and to assist the Board in disposing of challenges to the eligibility of voters, a list of the names and addresses of employees eligible to vote in a representation election (the Excelsior list) must be filed by the employer with the Regional Director within 7 days after an election has been directed. The list would be made available to all participants in the election. Failure to file the Excelsior list would be grounds for setting aside an election whenever "proper objections are filed." The Board reasoned that without an Excelsior list, election participants lack an adequate opportunity to communicate with all employees concerning election issues, and that therefore, the list is necessary to assure an "informed electorate." The Excelsior "rule" was not applied to the parties in *Excelsior* but was made applicable to all elections directed 30 days after the date of the *Excelsior* decision.

Excelsior list within 7 days of the issuance of Notice of the Second Election. On September 9, 1966 Beech-Nut filed exceptions to the orders of August 10 and 26 and a request for review which the Board denied in a telegram dated September 23, 1966. On October 14, 1966 the Regional Director granted the requests of District 65 and the Joint Committee to withdraw from participation in the second election, and on November 29, 1966 the Regional Director issued a Notice of Rerun Election and ordered Beech Nut to submit an Excelsior list no later than December 7, 1966. In a letter dated December 5, 1966 Beech-Nut informed the Regional Director that it would not submit an Excelsior list since it believed the Excelsior "rule" was invalid. The Regional Director thereupon postponed the second election indefinitely.

On December 13, 1966 pursuant to Section 11(1) of the Act, (29 U.S.C. § 161(1)), the Board issued a "subpena *duces tecum*" which was served on Beech-Nut the next day. The subpena directed that Beech-Nut either, 1) produce before the Regional Director its corporate records, including personnel and payroll records, showing the names and addresses of all its salesmen in Division 1; or, 2) furnish the Regional Director, a list of the names and addresses of its salesmen in Division 1. On December 19, 1966 Beech-Nut filed a petition to revoke the subpena which the Board denied in a telegram dated December 29, 1966. Thereafter, the Board instituted the proceeding now before the court.

Beech-Nut contends that, 1) the subpena is invalid since it does not call for the production of "evidence" within

the meaning of Sections 11(1) and (2) of the Act[2]; 2) there was substantial compliance with the Excelsior "rule" since Local 153 had the names and addresses of Beech-Nut's salesmen prior to the first election which should not have been set aside; 3) the Excelsior "rule" is invalid because: a) production of the addresses of Beech-Nut's salesmen will subject Beech-Nut to a risk of serious competitive injury and will infringe upon the salesmen's right of privacy and their right not to participate in union activities; b) the "rule" was not promulgated in accordance with the Administrative Procedure Act, 5 U.S.C. §§ 1001-1011; 4) the court does not have jurisdiction to issue an order compelling the production of an Excelsior list.

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[2] Section 11 of the Act provides in relevant part that,

"(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any such party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. * * *

"(2) In case of . . . refusal to obey a subpena issued to any person, any district court of the United States . . . within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of . . . refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; . . ."

The court holds that it has jurisdiction under Section 11(2) of the Act, sustains the Board's subpena, and directs Beech-Nut to comply therewith.

The language of Section 11 of the Act is broad enough to permit the Board to subpena material needed to assist it in conducting representation elections (*N.L.R.B.* v. *Duval Jewelry Co.*, 243 F.2d 427 (5th Cir. 1957), *reversed on other grounds*, 357 U.S. 1 (1958); *D. G. Bland Lumber Co.* v. *N.L.R.B.*, 177 F.2d 555 (5th Cir. 1949); *N.L.R.B.* v. *Northern Trust Co.*, 148 F.2d 24 (7th Cir.), *cert. denied*, 326 U.S. 731 (1945)), including material such as pay roll records needed to assist the Board in determining which employees are eligible to vote. *Cudahy Packing Co.* v. *N.L.R.B.*, 117 F.2d 692 (10th Cir. 1941); *N.L.R.B.* v. *New England Transp. Co.*, 14 F. Supp. 497 (D.Conn. 1936).

In *Excelsior*, the Board concluded that disclosure of the names and addresses of employees would assist the Board in handling challenges to the eligibility of employees to vote in representation elections. This conclusion is not arbitrary or unreasonable. *Swift & Company* v. *Solien*, CCH Labor Law Reporter ¶ 12,140 (E.D.Mo. 1967). See *N.L.R.B.* v. *Tower Co.*, 329 U.S. 324, 331 (1946) ("... the Board must adopt policies and promulgate rules ... in order that employees' votes may be counted accurately, efficiently and speedily."); *N.L.R.B.* v. *Waterman Steamship Corp.*, 309 U.S. 206, 226 (1940) ("The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone."); see also *N.L.R.B.* v. *Friedman*, 352 F.2d 545 (3d Cir. 1965); *N.L.R.B.* v.

C.C.C. Associates, Inc., 306 F.2d 534, 538 (2d Cir. 1962) (scope of judicial review is "extremely limited" with respect to an application by the Board under Section 11 of the Act). Accordingly, since the Excelsior list will assist the Board in conducting a representation election, the subpena does not exceed the Board's power under Section 11 of the Act. *Swift & Company* v. *Solien, supra; N.L.R.B.* v. *Wyman-Gordon Co.*, CCH Labor Law Reporter ¶ 12,071 (D.Mass. 1967); *N.L.R.B.* v. *British Auto Parts, Inc.*, CCH Labor Law Reporter ¶ 11,745 (C.D.Calif. 1967); see *N.L.R.B.* v. *Rohlen*, CCH Labor Law Reporter ¶ 11,661 (N.D.Ill. 1967); *N.L.R.B.* v. *Wolverine Industries Division*, CCH Labor Law Reporter ¶ 11,658 (E.D.Mich. 1966). *Contra N.L.R.B.* v. *Montgomery Ward & Co.*, CCH Labor Law Reporter ¶ 11,659 (M.D.Fla. 1967); *N.L.R.B.* v. *Hanes Hosiery Division*, CCH Labor Law Reporter ¶ 11,587 (M.D.N.C. 1966).

The fact that the Board makes the Excelsior list available to the participants in the election, does not mean that the Excelsior list is not "evidence" (*Swift & Company* v. *Solien, supra; cf. N.L.R.B.* v. *Friedman, supra*), since the disclosure of the list to election participants is of assistance in handling challenges to the eligibility of employees to vote.

In support of its contention that there was substantial compliance with the Excelsior "rule" in the first election, Beech-Nut points out that, 1) according to the election literature mailed out by Local 153, Local 153 had the names and addresses of Beech-Nut's salesmen; and, 2) Local 153 fully communicated with and presented its arguments to Beech-Nut's salesmen.

If Local 153 had the names and addresses of Beech-Nut's salesmen, prior to the first election, Beech-Nut would not have been injured by complying with the Excelsior rule. See *Swift & Company* v. *Solien, supra.* In addition, the list compiled by Local 153 may not have been accurate and complete and, even if it was, a list of eligible voters is likely to change with time. The Board is entitled to require Beech-Nut to submit a list so that it can be checked with any lists obtained by the participants in the election. The *Excelsior* decision points out that this process of checking minimizes the number of challenges to the eligibility of voters that have to be ruled on by the Regional Director or the Board. With respect to Beech-Nut's contention that the first election should not have been set aside, it is clear that this court has no jurisdiction to review the decision of the Board setting the election aside. See, e.g., *Boire* v. *Greyhound Corp.*, 376 U.S. 473 (1964).

Beech-Nut argues that it has a substantial proprietary interest in preserving the secrecy of the names and addresses of its salesmen, and that if their names and addresses are made available, it will be subjected to a risk of serious competitive injury. In support of this argument Beech-Nut has submitted the affidavit of its director of marketing and sales administration which points out that Beech-Nut is in the highly competitive business of manufacturing and marketing foods, beverages and confections; that its salesmen have knowledge of marketing and advertising plans prior to their implementation when these are not known to Beech-Nut's competitors who would benefit from advance knowledge thereof; and that if the names and addresses of Beech-Nut's salesmen were available to participants in representation elections, the risk that com-

petitors would learn their names and addresses would be substantially increased, giving competitors a greater opportunity to learn Beech-Nut's plans, and to "pirate" Beech-Nut's salesmen.

Beech-Nut's argument is speculative at best and, even if it should be assumed that competitors have no other way of learning the names and addresses of Beech-Nut's salesmen, it cannot prevail. *N.L.R.B.* v. *Rohlen, supra*; see *F.C.C.* v. *Schreiber*, 381 U.S. 279 (1965); *N.L.R.B.* v. *Friedman, supra; N.L.R.B.* v. *Kingston Trap Rock Co.*, 222 F.2d 299 (3d Cir. 1955). Beech-Nut has legal remedies available to protect itelf (see, e.g., New York Penal Law § 554; *Purchasing Associates, Inc.* v. *Weitz*, 13 N.Y.2d 267, 246 N.Y.S.2d 600 (1963); *Minnesota Mining & Manufacturing Co.* v. *Technical Tape Corp.*, 23 Misc.2d 671, 192 N.Y.S.2d 102 (Sup. Ct. Westchester Co. 1959), *aff'd*, 15 A.D.2d 960, 226 N.Y.S.2d 1021 (2d Dept. 1962)), and the participants in the representation election have a substantial interest in knowing the names and addresses of Beech-Nut's salesmen. See Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 99-100 (1964).

Beech-Nut contends that disclosure of names and addresses of its salesmen will infringe upon their right not to participate in union activities and upon their right of privacy because its salesmen will be subjected to unwanted intrusions into their homes, and, will have to "submit to communication with a union" in violation of their right under Section 7 of the Act, (29 U.S.C. § 157), not to participate in union activities. However, as the Board points out, the Excelsior rule "simply gives unions an opportunity

to reach employees; it does not compel employees to read union literature mailed to them or to discuss the union with fellow employees or union representatives who might come to their homes for that purpose." The Section 7 rights of employees are not violated by union communication with the employees resulting from an Excelsior list ordered by the Board. See, e.g., *N.L.R.B.* v. *S & H Grossinger's Inc.*, 372 F.2d 26 (2d Cir. 1967).

Beech-Nut salesmen are not required to talk to the representatives of the competing unions, or to read their literature. The possible annoyance of being telephoned or visited at their homes is far outweighed by the public interest in an informed electorate. See *N.L.R.B.* v. *Wyman-Gordon Co., supra;* Bok, *supra* at 99-100; *cf. N.L.R.B.* v. *F. W. Woolworth Co.*, 352 U.S. 938, *reversing per curiam*, 235 F.2d 319 (9th Cir. 1956); compare *Staub* v. *City of Baxley*, 355 U.S. 313 (1958); *Martin* v. *City of Struthers*, 319 U.S. 141 (1943); *Lamont* v. *Commissioner of Motor Vehicles*, _____ F. Supp. _____ (S.D.N.Y. June 22, 1967). Remedies are available to the salesmen in the event of threats or intimidation. See Excelsior Underwear Inc., *supra;* Bok, *supra.*

Finally, Beech-Nut contends that the Excelsior rule is invalid since it is a rule within the meaning of Section 2(c) of the Administrative Procedure Act, 5 U.S.C. § 1001(c), and was not promulgated in accordance with the procedure for rule-making specified in Sections 3(a)(3) and 4 of the Administrative Procedure Act. 5 U.S.C. §§ 1002(a)(3), 1003. It is clear, however, that the Board can make "rules" either by using the rule making procedures specified in the Administrative Procedure Act,

or by administrative adjudication. See *N.L.R.B.* v. *Penn Cork & Closures, Inc.*, 376 F.2d 52, 57 (2d Cir. 1967); *N.L.R.B.* v. *A.P.W. Products Co.*, 316 F.2d 899 (2d Cir. 1963). Therefore the Excelsior rule is valid and giving the rule prospective application was a proper exercise of the Board's discretion. See *Rockwell Manufacturing Co.* v. *N.L.R.B.*, 330 F.2d 795 (7th Cir.), *cert. denied*, 379 U.S. 890 (1964); see also *N.L.R.B.* v. *Seven-Up Bottling Co.*, 344 U.S. 344 (1953). Moreover, Beech-Nut was given an opportunity to be heard and to present arguments as to why the Excelsior rule should not be applied to it. Compare *Chicago, Burlington & Quincy R. Co.* v. *United States*, 242 F. Supp. 414 (N.D.Ill. 1965), *aff'd per curiam*, 382 U.S. 422 (1966); *N.L.R.B.* v. *E & B Brewing Co.*, 276 F.2d 594 (6th Cir. 1960), *cert. denied*, 366 U.S. 908 (1961).

For the foregoing reasons, Beech-Nut is directed to comply with the Board's "subpena *duces tecum*." There is no need therefore, to pass upon the Board's alternative application for an order in the nature of a mandatory injunction directing Beech-Nut to file an Excelsior list with the Regional Director or to pass upon Beech-Nut's contention that the court lacks jurisdiction to issue such an order.

Beech-Nut is directed to comply with the "subpena *duces tecum*" issued by the Board within 30 days of the order to be entered herein.

Settle order on notice.

Dated: New York, N.Y.
September 18, 1967.

DUDLEY B. BONSAL
U.S.D.J.

Subpena Duces Tecum Issued by National Labor Relations Board

(R. 23a)

SUBPENA DUCES TECUM

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

To

Beech-Nut Life Savers, Inc.
Att: John Mason Harding, Esq.
605 Third Avenue, New York, N. Y. 10016

Request therefor having been duly made by Edwin H. Bennett, Attorney National Labor Relations Board whose address is 745 Fifth Avenue, New York, New York

You are hereby required and directed to appear before Ivan C. McLeod, Regional Director, Second Region of the National Labor Relations Board, at 745 Fifth Avenue, Fifth Floor, in the City of New York, on the 20th day of December 1966 at 10 o'clock a.m. of that day, to testify in the *Matter of Beech-Nut Life Savers, Inc.* Case No. 2-RC-14275

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

See Rider Attached.

In testimony whereof, the seal of the National Labor Relations Board is affixed

Subpena Duces Tecum Issued by National Labor Relations Board

hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand and authorized the issuance hereof.

B-61639
(Seal)

Issued at New York, New York 10022 this 13th day of December 1966

/s/ HOWARD JENKINS, JR.

Case No. 2-RC-14275

RIDER

1. The corporate records of Beech-Nut Life Savers, Inc. including but not limited to personnel and payroll records, as will show the names and addresses of all salesmen employed by the Employer in its Division 1 located at 462 Park Avenue South, New York, New York, including assistant unit managers, supermarket, grocery, confection and senior confection salesmen and "special representatives," who were employed during the semi-monthly payroll period ending November 15, 1966.

2. In lieu of the physical production of the books and records requested in 1. above, Beech-Nut Life Savers, Inc., may furnish a list of the names and addresses of all its employees as described in 1. above.

3. In lieu of producing the records or list requested in 1. or 2. above at the office of the National Labor Relations Board, 745 Fifth Avenue, New York, New York, Beech-Nut Life Savers, Inc. may, in advance of the return date of this subpena, produce the specified records or list requested in 1. or 2. above at its office at 605 Third Avenue, New York, New York, for inspection and copying by an agent of the National Labor Relations Board.

Opinion of First Circuit in *Wyman-Gordon Co.* v. *NLRB*, 397 F.2d 394 (1968)

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 7000.

WYMAN-GORDON COMPANY ET AL.,

Appellants,

v.

NATIONAL LABOR RELATIONS BOARD,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[270 F. Supp. 280]

Before ALDRICH, *Chief Judge,*
McENTEE and COFFIN, *Circuit Judges.*

Quentin O. Young, with whom *Herrick, Smith, Donald, Farley & Ketchum* was on brief, for appellants.

Solomon I. Hirsh, Attorney, with whom *Arnold Ordman,* General Counsel, *Dominick L. Manoli,* Associate General Counsel, *Marcel Mallet-Prevost,* Assistant General Counsel, and *Bernard Dworski,* Attorney, were on brief, for appellee.

June 12, 1968.

ALDRICH, *Chief Judge.* This is an appeal from an order of the district court enforcing compliance with a National Labor Relations Board subpoena which ordered an em-

ployer to furnish names and addresses to its employees. The issuance of the subpoena stems from efforts of two unions, the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO (Boilermakers), and the United Steelworkers of America, AFL-CIO (Steelworkers), to represent some 1750 production and maintenance employees at appellant's plants in three Massachusetts communities. The Board's Regional Director, after investigation and hearing, ordered an election and directed appellant, in accordance with the rule announced in *Excelsior Underwear, Inc.*, 1966, 156 N.L.R.B. 1236, to furnish the Board a list of the names and addresses of all employees eligible to vote. Appellant agreed to furnish a list of names, but refused to supply addresses. Notwithstanding this refusal, the election was held, resulting in 226 votes for the Boilermakers, 555 for the Steelworkers, and 903 against any union.

On objection by both unions, the Regional Director set aside the election and ordered a new one. The Board affirmed this decision. Again the Regional Director demanded an *Excelsior* list, and again appellant refused. The subpoena then issued. The Board filed a complaint seeking enforcement of the subpoena or, alternatively, a mandatory injunction directing appellant to comply with the *Excelsior* requirement. The district court ordered enforcement of the subpoena, and this appeal followed. By it appellant has launched a broadside attack against the *Excelsior* rule, challenging its substance, the procedure of its promulgation, and the statutory basis of the subpoena power invoked to enforce it.

Opinion of First Circuit in Wyman-Gordon Co. *v.* NLRB, *397 F.2d 394 (1968)*

The court is of one mind in not being greatly impressed by the arguments challenging the wisdom of the *Excelsior* rule, but this is a matter on which the majority of the court does not feel called upon to make a decision. We mention briefly the Board's concern in insuring an informed employee electorate, and in balancing management's right of access to employees in the plant through the mails with a right on the part of unions—and anti-union employees—to have access to the addresses of a constantly changing roster of employees. It is unnecessary to repeat the Board's responses in *Excelsior* to the contentions that its authority to compel disclosure is limited to cases where other channels of information do not exist and that such compulsory disclosure invades the privacy of employees. Likewise we are not greatly impressed by the contention that compelling a list of names and addresses forces appellant to "interfere" with a labor organization, in violation of 29 U.S.C. § 158(a)(2), and to give a "thing of value" to a labor organization, in violation of 29 U.S.C. § 186. The former statute, as is indicated by the cases cited to us by appellant, is concerned with acts of favoritism. It is difficult to think that supplying the Board with information, pursuant to a Board order, which the Board will give to all persons alike who show a legitimate interest, would be considered a proscribed gift.

A threshhold question, however, is raised by appellant's claim that the *Excelsior* rule is invalid because, concededly, it was promulgated in disregard of the notice and publication requirements of the Administrative Procedure

Act, 5 U.S.C.A. §§ 552, 553.[1] In the opinion of the majority of the court this issue is determinative.

Events leading to the establishment of the rule grew out of two consolidated cases coming before the Board on union challenges of elections on the ground that the employers had refused to supply the unions with lists of names and addresses of employees so that the unions might answer a campaign letter sent by the company to the employees. Recognizing the problem to be one affecting more than just the parties before it, the Board chose to solicit the assistance of selected amici curiae, and, ultimately, to establish a rule which not only did not apply to the parties before it, but did not take effect for thirty days.[2] In so doing we consider that the Board, to put it bluntly, designed its own rulemaking procedure, adopting such part of the Congressional mandate as it chose, and rejecting the rest.

In presently justifying its position the Board does not seek to carve out for itself the special defense suggested by our brother Coffin in dissent, but asserts that what it did was proper administrative action approved by the Court in *SEC* v. *Chenery Corp.*, 1947, 332 U.S. 194. It is, of

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[1] We are not here concerned with the effect of failure to publish rules, themselves properly arrived at, in compliance with 5 U.S.C.A. § 552(a)(1). In this respect we agree with the views of Judge Friendly speaking for the court in *United States* v. *Aarons*, 2 Cir., 1962, 310 F.2d 341, 347-48, that such rules are valid as against one with actual notice of them. See 1 Davis, Administrative Law § 6.10 (1958).

[2] Thirty days is the period which must elapse between publication and effective date of a rule promulgated in accordance with APA procedures. 5 U.S.C.A. § 553(d).

course, true that the Court there recognized that an adjudicatory administrative body may promulgate rules through decision as well as through more formal rule-making procedures. This is a necessary and inevitable consequence of adjudication. Normally the Board must decide cases between party and party, as the Commission did in *Chenery*. The result, if stare decisis is to mean anything, is that any principle, once decided, stands as a guide for the future and may be spoken of as a rule. Examples are legion. Sometimes, until the Board spoke, all parties may have thought the "rule" was the other way. This may be unfortunate, but it is normally unavoidable, as *Chenery* demonstrates.

In *Excelsior*, however, the Board did not decide a case between party and party, or, more exactly, it decided a case one way, and took occasion to lay down a future rule the other way. *Chenery* in no fashion suggests approval of this. On the contrary, to the extent the Board was not deciding a case, this is precisely where Congress had instructed it as to the procedure it should adopt. The Board has chosen to disregard Congress.

Although the first time in this circuit, this is neither the first nor the most severe instance of Board action approximating contravention of the APA in this manner. It has been long and severely criticized, *e.g.*, Peck, The Atrophied Rule-Making Powers of the National Labor Relations Board, 70 Yale L.J. 729 (1961); 1 Davis, Administrative Law § 6.13 (Supp. 1967), with no apparent effect. We regret that the matter comes before us in connection with a rule to which we see little or no objection

and for which there is much to be said. Yet, to blink at this procedure in this instance because we may approve of the result, we believe would be neither honest nor wise.[3] Congress provided no exception in the APA for rules improperly promulgated, but which some court, in a case between the agency and some individual, was persuaded were sound. To recognize such an exception would be to emasculate the statute.

We read Judge Coffin's dissent as disagreeing on this matter only in that he believes the rule promulgated to be "procedural" within the APA definition and therefore not subject to the requirement that advance notice of the intended rulemaking, and the substance of the rule, be given and that interested parties be afforded an opportunity to comment. 5 U.S.C.A. § 553. If the rule related simply to the mechanics of conducting an election, to superintending or checking the voters, we would agree. The *Excelsior* opinion makes the suggestion that this is one of the purposes. 156 N.L.R.B., *supra*, at 1242-43. However, the Board's decision effectively contradicts its own declaration. The Board already had a valid rule requiring the employer to furnish a checklist. The additional requirement of the *Excelsior* rule is expressly stated not to apply when the time interval is "too brief . . . for the union to be able to make any meaningful use of this information." *Id* at 1242,

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[3] We are not unmindful that two circuits have supported the *Excelsior* rule. *NLRB* v. *Rohlen*, 7 Cir., 1967, 385 F.2d 52; *NLRB* v. *Hanes Corp.*, 4 Cir., 1967, 384 F.2d 188, *cert. denied* 390 U.S. 950. However, so far as appears, the Board's failure to comply with the APA was not brought to the courts' attention. The courts were concerned with whether the substance of the rule was within the Board's rule-making power, not whether it was properly adopted.

fn. 14. We can only conclude that *Excelsior's* purpose is what it appears to be on its face, a provision requiring the employer to furnish interested parties with affirmative assistance in conducting their election campaigns.

Such assistance is substance, not Board procedure. It differs only in degree and not in kind from a requirement, for example, that an employer having an assembly hall or a printing press should make it available to groups requesting it. The Board's contentions that furnishing a mailing list is not expensive or seriously burdensome, or is required only because the union has no effective substitute, may well be justifications for the rule, but they do not change its character. Judge Coffin's emphasis on the relative lack of burden, and comparing the compilation of the list with affording space on a bulletin board, suggests factual determinations in each case that seem to us unnecessary at best. His desire to resolve questions of doubt in favor of a procedural label loses importance to us when one considers that its only purpose is to avoid affording interested parties an opportunity to present their views as to what is, quite apparently, a controversial rule.

It is also true that compliance with the rule may well increase the fairness of the election. This, however, is a conclusory argument. Many actions by the employer may add to the fairness of the election. This does not mean that ordering them to be done is procedural. We are particularly unmoved by our brother Coffin's suggestion that the fact the rule sets up a positive as distinguished from a negative requirement is indicative that it is not substantive.

Opinion of First Circuit in Wyman-Gordon Co. *v.* NLRB, *397 F.2d 394 (1968)*

The judgment of the district court is set aside and the court is ordered to dismiss the complaint.

COFFIN, *Circuit Judge* (dissenting). For the purpose of deciding the applicability of the notice provision of the Administrative Procedure Act, 5 U.S.C.A. § 1003(a), I view the *Excelsior* rule as procedural and thus valid despite absence of advance notice. I recognize that this is a ground not relied on by the Board, which seemed to assert a standard defense to a standard assault. But the same shoe fits both parties, for the distinction which divides this court was obviously far from the concern of appellant, which said in its brief, ". . . it is clear the Board recognized that it was establishing a new rule or procedure in the conduct of election proceedings under Section 9 of the Act."

The legislative history suggests to me that in grey areas doubt about the nature of a rule should be resolved in favor of applying the procedural label. In the first place, the few attempts to define terms equate substantive rules with "rules issued pursuant to statutory authority to implement statutory policy, as by fixing rates or defining standards", Attorney General's Manual on the A.P.A. (1947) 13 n. 5, or with rules "other than organizational or procedural . . . which implement the statute, as, for example, the proxy rules issued by the Securities and Exchange Commission pursuant to . . . 15 U.S.C. 78n." Manual, *supra* at 30. I read the language and these examples as giving restrictive rather than expansive meanings to "substantive rule".

In addition, the Senate Committee on the Judiciary made clear that in exempting procedural rules from the notice

requirement it was seeking to encourage such rules because "those types of rules vary so greatly in their contents and the occasion for their issuance that it seems wise to leave the matter of notice and public procedures to the discretion of the agencies concerned." Legis. Hist. of the A.P.A. (1946), 18, 313.

The *Excelsior* rule itself seems to me to be clearly on the procedural side. It sets up a positive requirement of furnishing addresses as well as names of employees, to be applicable in every election. In this respect it differs from the proscription of selectively directed acts of coercion which are more appropriately accomplished through the unfair labor practice procedures.

That the requirement looks toward action the effect of which reaches beyond relations between a party and the Board ought not to be a controlling consideration, any more than it is with reference to the requirement in 29 C.F.R. § 101.19 (the Board's "Statements of Procedure" governing elections) that elections "be adequately publicized by the posting of official notices in the establishment. . . ." Indeed, the natural home of the *Excelsior* rule would seem to be in § 101.19.[1]

It is also, I think, a factor of relevance to the substance vs. procedure issue that the burden on the employer's time,

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[1] All of this only refers to the primary objective of *Excelsior*, to achieve better elections. The fact that a secondary purpose, the expeditious handling of challenges of voter eligibility, is uncontrovertedly procedural is an added factor of some significance. While a procedural secondary rule could not save a rule otherwise clearly substantive, it would seem that a primary purpose of ambiguous effect might be aided, insofar as notice is concerned, by such a secondary purpose.

efforts, or property in being compelled to furnish addresses of employees is inconsequential. I do not share the court's conclusion that this requirement "differs only in degree and not in kind" from one that would force an employer to make an assembly hall available on request. I would say that we are dealing with a dichotomy where difference in degree can result in a difference of kind or difference in categorization. This, I think, is illustrated by the above noted procedural requirement that notices of election be posted "in the establishment"—in itself a minimal encroachment on the employer's domain.

While it may be that forcing employers to share with unions their previous monopoly on knowledge of addresses may have a net result of strengthening union power generally, such a result cannot be said to alter substantive "rights" unless the employer's prior easy access to addresses rises to the dignity of a right. *Cf. Sibbach* v. *Wilson,* 312 U.S. 1, 14 (1941). Moreover, the *Excelsior* rule by its terms applies to "all parties"—which include employees hostile to a new union or seeking decertification of an old one. *Cf. Wallace Murray Co.,* 1968-1 CCH NLRB Dec. ¶ 22,256.

I would, for the above reasons, hold that the *Excelsior* rule was valid. But this would not have been an end to the case. There remains the difficult question—how, if at all, can *Excelsior* be properly enforced?[2] The district court ordered that the subpoena be honored. The Board's power lies in the statutory language granting "the right to copy

[2] While what follows goes beyond the issue which divides the court, the writer feels obliged to explore the problem of enforcement which has led to conflicting and often strained statutory interpretation.

any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. . . ." 29 U.S.C.A. § 161(1).

The authorities which have upheld the subpoena power as available to procure an *Excelsior* list[3] have defined the proceedings leading to representation certification as an investigation and have tortured the concept of "evidence" into something which is helpful in "facilitating a fully informed electorate". *NLRB* v. *Rohlen, supra* at 57. A scrutiny of 29 U.S.C.A. § 161 yields the impression that "evidence" is used throughout in its more traditional sense as data relevant to the proof of a fact in issue.[4] I am sympathetic with the courts which have not been willing to make this leap. *NLRB* v. *Q-T Shoe Co.*, Civil No. 140-67 (D.N.J., filed Jan. 19, 1968); *NLRB* v. *Montgomery Ward, Inc.*, 54 CCH Lab. Cas. ¶ 11659 (M.D.Fla. 1967).

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[3] *NLRB* v. *Rohlen*, 385 F.2d 52 (7th Cir. 1967); *NLRB* v. *Hanes Corp.*, 384 F.2d 188 (4th Cir. 1968), *cert. denied* March 4, 1968; *NLRB* v. *British Auto Parts*, 266 F. Supp. 368 (C.D.Cal. 1967); *Swift* v. *Solien*, 56 CCH Lab. Cas. ¶ 12140 (E.D.Mo. 1967); *NLRB* v. *Teledyne, Inc.*, 56 CCH Lab. Cas. ¶ 12229 (N.D.Cal. 1967); *NLRB* v. *Beech-Nut, Inc.*, 56 CCH Lab. Cas. ¶ 12237 (S.D.N.Y. 1967).

[4] A similar approach would be to define more narrowly the particular "investigation" as the quest for the names and addresses of the employees. With this frame of reference, the list of such names and addresses could be considered more traditionally as "evidence" relevant to the proof of the object of the investigation. Indeed the subpoena served on appellant contemplated a hearing before the Regional Director at which appellant's president was to testify from corporate books and records concerning the names and addresses of employees. In lieu of such books, a list would be received but only after Board agents had "verified its contents by examination of the subpoenaed books and records". In short, the list is arguably evidence tending to establish the true names and addresses being sought. The difficulty with this approach is that it tortures the word "investigation" into something quite different from its use in 29 U.S.C.A. § 159.

A second solution, suggested by *Q-T Shoe Co., supra,* is that the only way to enforce the *Excelsior* rule is first to secure a determination that refusal by an employer to provide a list of names and addresses of employees constitutes an unfair labor practice under 29 U.S.C.A. § 158(a)(1), and then to seek the aid of the court under 29 U.S.C.A. § 160(e). This would seem plausible until the statutory definitions of unfair labor practices are examined. The Board in *Excelsior* wisely refrained from saying whether refusal to disclose names and addresses of employees would constitute "interference, restraint, or coercion" within the meaning of 29 U.S.C.A. § 158(a)(1). I would say that it is at least doubtful that any one of the effective verbs would cover such a case. "Interfere" is the most adaptable, but its entire thrust is aggressive, not passive. According to Webster's International Dictionary (3d int. ed. 1961), it means such things as "intervene", "intermeddle", and "interpose".

It cannot be said with assurance that a refusal to respond to the *Excelsior* rule—unless, perhaps, a repeated refusal—would predictably be denominated an unfair labor practice.[5] Moreover, constant litigation would ensue over the issue whether, in a given case, the refusal to provide a list had any effect at all on the representation proceeding. For example, in the case at bar appellant moved to quash the subpoena, citing as one ground that the unions already had employee mailing lists.

This leads to the remaining mode of enforcing the rule, if indeed there is any way at all. This is the injunction.

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[5] I would add that I would prefer some lesser sanction for enforcement of procedural rules than that stemming from an unfair labor practice proceeding.

Opinion of First Circuit in Wyman-Gordon Co. *v.* NLRB, *397 F.2d 394 (1968)*

The Congress has indicated by statute that the Board has authority to prescribe "regulations and rules of decision" governing consent elections. 29 U.S.C.A. § 159(c)(4). The Supreme Court has made it clear that "The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly . . . [are] matters which Congress entrusted to the Board alone." *NLRB* v. *Waterman S.S. Corp.*, 309 U.S. 206, 226 (1940).

While there is a step between statute and rule, not present in *United States* v. *Feaster*, 330 F.2d 671 (5th Cir. 1964), I see no difference in principle. If, in *Feaster*, the statutory right to have access to books and records supported an injunction compelling access to names, addresses, and job classifications of employees, so here a rule predicated on statutory authority to regulate elections and carrying out Congressional policy should support the same remedy. Or, to go back to the observation in *Walling* v. *Brooklyn Braid Co.*, 152 F.2d 938, 941 (2d Cir. 1945), we should "consider whether the injunction in reasonably required as an aid in the administration of the statute, to the end that the Congressional purposes underlying its enactment shall not be thwarted."

Assuming, therefore, the validity of the *Excelsior* rule, I see no other certain way in which it can be enforced than by injunction. And while the absence of other remedy is no adequate justification for judicial invention, I feel that enforcement of the rule lies well within the equity powers of the district court. I would therefore remand the case for consideration of the Board's alternative prayer for an injunction.

Opinion of National Labor Relations Board in *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966)

156 NLRB No. 111

D-8291
Saluda, S.C.
and Long Beach, Calif.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

EXCELSIOR UNDERWEAR, INC. AND SALUDA KNITTING INC. *Employer*[1] and AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO *Petitioner*	Case No. 11-RC-1876
K. L. KELLOGG & SONS *Employer*[2] and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 3, AFL-CIO, AND INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 12, AFL-CIO. *Joint Petitioners*	Case No. 21-RC-8955

DECISIONS AND CERTIFICATIONS
OF
RESULTS OF ELECTIONS

In the *Excelsior* case, pursuant to a Stipulation for Certification upon Consent Election, an election by secret ballot was conducted by the Regional Director for Region 11 on December 6, 1963, among the employees in the unit

[1] Referred to herein as the *Excelsior* case.
[2] Referred to herein as the *Kellogg* case.

described below. After the election, the parties were furnished with a tally of ballots which showed that of approximately 247 eligible voters, 246 cast ballots, of which 35 were for, and 206 against, the Petitioner, and 5 challenged. The challenges were insufficient in number to affect the results of the election. The Petitioner filed timely objections to conduct affecting the results.

The objections, as summarized by the Regional Director, related to the following:

(1) The Employer's conduct on November 29 in mailing to all employees an 8-page letter allegedly containing material misstatements as to Union dues and initiation fees, as well as provisions of the National Labor Relations Act, threats of plant closings, strikes and violence, and a predetermined position of refusing to bargain in the event the Union were to be selected as bargaining representative.

(2) The Employer's conduct in refusing to supply the Union with a list of employees and their addresses for the purpose of allowing the Union to answer the letter referred to in Objection No. 1.

(3) The Employer's conduct on or about December 4, in posting a notice at its plants materially misrepresenting Union officials' salaries.

(4) The Employer's conduct on December 5, in giving a speech to employees on Company time containing promises of benefit if the employees did not select the Union as their bargaining representative.

(5) The conduct of certain townspeople of Saluda, South Carolina, in speaking to groups of employees on December 3 and 4, and informing them that other companies interested in relocating in Saluda, South Carolina, would not do so if the Union were selected as bargaining representative. Said townspeople allegedly

also stated that Union representatives were Communistic and did not believe in God.

After investigation, the Regional Director, on January 10, 1964, issued and served upon the parties his Report and Recommendation on Objections, in which he recommended that the objections be overruled and that a certification of election results be issued. Petitioner filed timely exceptions to the Regional Director's report.

In the *Kellogg* case, pursuant to a Stipulation for Certification upon Consent Election, a mail election by secret ballot was conducted by the Regional Director for Region 21 between May 15, 1964, and May 28, 1964, among the employees in the unit described below. After the election, the parties were furnished with a tally of ballots which showed that of approximately 31 eligible voters, 30 cast votes of which 9 were for, and 21 against, the Joint-Petitioners. The Joint Petitioners filed timely objections to conduct affecting the results of the election.

Objection No. 1 alleged that the Employer, on or about May 5, 1964, and May 13, 1964, sent to each employee letters containing certain false and coercive material. Objection No. 2 complained of the Employer's denial of the Joint-Petitioners' request for a list of employees' names and addresses so that it would have an opportunity to mail campaign material to those employees.

After investigation, the Regional Director, on July 16, 1964, issued and served upon the parties his Report and Recommendation on Objections, in which he recommended that Objection No. 1 be sustained, Objection No. 2 be overruled, and the election be set aside and a new election di-

rected. The Joint-Petitioners filed timely exceptions to the Regional Director's recommendation that Objection No. 2 be overruled.[3]

On April 2, 1965, the National Labor Relations Board, having determined that the Employer's denial of the Petitioners' request for the names and addresses of employees eligible to vote in the elections in these two cases presented a question of substantial importance in the administration of the National Labor Relations Act, as amended, ordered that the two cases be consolidated, and that oral argument be heard before the Board on May 20, 1965. The parties were given permission to file further briefs and directed to focus their attention, in briefs and argument, on the following questions:

> I. Can a fair and free election be held when the union involved lacks the names and addresses of employees eligible to vote in that election, and the employer refuses to accede to the union's request therefor?
>
> II. If such information should be made available, should the requirement be limited to situations in which the employer has utilized his knowledge of these names and addresses to mail antiunion letters or literature to employees' homes?
>
> III. If some requirement that the employer make addresses available is to be imposed, how should this be implemented? For example, should such names and addresses be furnished to a mailing service with instructions to mail, at the union's expense, such materials as the union may furnish? Or, should the union be entitled to have the names and addresses?

[3] The Employer filed timely exceptions to the Regional Director's recommendation with respect to Objection No. 1.

Opinion of National Labor Relations Board in Excelsior Underwear, Inc., *156 N.L.R.B. 1236 (1966)*

The Board also invited certain interested parties to file briefs *amicus curiae* and to participate in oral argument. This invitation was accepted by: the Chamber of Commerce of the United States; American Federation of Labor-Congress of Industrial Organizations; International Union of Electrical, Radio and Machine Workers, AFL-CIO; and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW-AFL-CIO. The National Association of Manufacturers, Retail Clerks International Association, AFL-CIO, and Textile Workers Union of America, AFL-CIO, filed briefs but did not participate in the argument. The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America participated in the argument but did not file a brief.

Upon the entire record in each of these cases, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The Petitioner (Joint-Petitioners in *Kellogg*) is a labor organization claiming to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4(a) In *Excelsior* the parties stipulated, and we find, that all production and maintenance employees, plant clerical employees, and janitors at both the Employer's plants

in Saluda, South Carolina, excluding all office clerical employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

(b) In *Kellogg* the parties stipulated, and we find, that all drillers, derrickmen, rotary helpers, yardmen, mechanics, and welders, excluding all office clerical employees, professional employees, truckdrivers, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

5. Exceptions 1, 3, 4, and 5 in *Excelsior* are without merit and hereby rejected.

6. Objection No. 2 in each of these cases poses the question whether an employer's refusal to provide a union with the names and addresses of employees eligible to vote in a representation election should be grounds on which to set that election aside. The Board has not in the past set elections aside on this ground. For, while the Board has required that an employer, shortly before an election, make available for inspection by the parties and the Regional Director a list of employees claimed by him to be eligible to vote in that election, there has been no requirement that this list contain addresses in addition to names. The rules governing representation elections are not, however, "fixed and immutable. They have been changed and refined, generally in the direction of higher standards."[4]

[4] *Sewell Manufacturing Company*, 138 NLRB 66, 70. And see, e.g., *Peerless Plywood Company*, 107 NLRB 427; *Gummed Products Co.*, 112 NLRB 1092; *Hollywood Ceramics Co., Inc.*, 140 NLRB 221; *Dal-Tex Optical Co.*, 137 NLRB 1782, at 1786-7.

Opinion of National Labor Relations Board in Excelsior Underwear, Inc., *156 N.L.R.B. 1236 (1966)*

We are persuaded, for the reasons set out below, that higher standards of disclosure than we have heretofore imposed are necessary, and that prompt disclosure of the information here sought by the Petitioners should be required in all representation elections. Accordingly, we now establish a requirement that will be applied in all election cases. That is, within 7 days after the Regional Director has approved a consent-election agreement entered into by the parties pursuant to Section 102.62 of the National Labor Relations Board Rules and Regulations or after the Regional Director or the Board has directed an election pursuant to Section 102.67, 102.69, or Section 102.85 thereof, the employer must file with the Regional Director an election eligibility list, containing the names and addresses of all the eligible voters. The Regional Director, in turn, shall make this information available to all parties in the case. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.[5]

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[5] In the event that the payroll period for eligibility purposes is subsequent to the direction of election or consent-election agreement, the eligibility list shall be filed within 7 days after the close of the determinative payroll period for eligibility purposes. In order to be timely, the eligibility list must be *received* by the Regional Director within the period required. No extension of time shall be granted by the Regional Director except in extraordinary circumstances nor shall the filing of a request for review operate to stay the requirement here imposed.

However, the rule we have here announced is to be applied prospectively only. It will not apply in the instant cases but only in those elections that are directed, or consented to, subsequent to 30 days from the date of this Decision. We impose this brief period of delay to insure that all parties to forthcoming representation elections are fully aware of their rights and obligations as here stated.

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The considerations that impel us to adopt the foregoing rule are these: "The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly [are] matters which Congress entrusted to the Board alone."[6] In discharging that trust, we regard it as the Board's function to conduct elections in which employees have the opportunity to cast their ballots for or against representation under circumstances that are free not only from interference, restraint, or coercion violative of the act, but also from other elements that prevent or impede a free and reasoned choice.[7] Among the factors that undoubtedly tend to impede such a choice is a lack of information with respect to one of the choices available.[8] In other words, an employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasoned choice. Accordingly, we think that it is appropriate for us to remove the impediment to communication to which our new rule is directed.

As a practical matter, an employer, through his possession of employee names and home addresses as well as his ability to communicate with employees on plant premises, is assured of the continuing opportunity to inform the entire electorate of his views with respect to union representation. On the other hand, without a list of employee

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[6] *N.L.R.B.* v. *Waterman S. S. Corp.*, 309 U.S. 206, 226; see, also, *N.L.R.B.* v. *Shirlington Supermarkets*, 224 F.2d 649, 651 (C.A. 4).

[7] See *General Shoe Corporation*, 77 NLRB 124, 126-127.

[8] See Bok, *The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act.* 78 Harv. L. Rev. 38, 46, 92 (1964).

names and addresses, a labor organization, whose organizers normally have no right of access to plant premises,[9] has no method by which it can be certain of reaching all the employees with its arguments in favor of representation, and, as a result, employees are often completely unaware of that point of view. This is not, of course, to deny the existence of various means by which a party *might* be able to communicate with a substantial portion of the electorate even without possessing their names and addresses. It is rather to say what seems to us obvious—that the access of *all* employees to such communications can be insured only if all parties have the names and addresses of all the voters.[10] In other words, by providing all parties with employees' names and addresses, we maximize the likelihood that all the voters will be exposed to the arguments for, as well as against, union representation.

Nor are employee names and addresses readily available from sources other than the employer. The names of some employees may be secured with the assistance of sympa-

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[9] *N.L.R.B.* v. *Babcock & Wilcox,* 351 U.S. 105.

[10] A union that does not know the names or addresses of some of the voters may seek to communicate with them by distributing literature on sidewalks or street corners adjoining the employer's premises or by utilizing the mass media of communication. The likelihood that *all* employees will be reached by these methods is, however, problematical at best. See *N.L.R.B.* v. *United Aircraft Corp.,* 324 F.2d 128, 130 (C.A. 2), cert. denied 376 U.S. 951. Personal solicitation on plant premises by employee supporters of the union, while vastly more satisfactory than the above methods, suffers from the limited periods of nonworking time available for solicitation (generally and legally forbidden during working time, *Peyton Packing Co.,* 49 NLRB 828, 843) and, in a large plant, the sheer physical problems involved in communicating with fellow employees.

thetic fellow employees, but, in a large plant or store, where many employees are unknown to their fellows, this method may not yield the names and addresses of a major proportion of the total employee complement.[11] Additionally, there are not infrequently employees on layoff status, sick leave, leave of absence, military leave, etc., eligible to vote,[12] yet unknown to their fellow employees. Furthermore, employees are frequently known to their fellows only by first names or nicknames, so that there may be significant problems in obtaining the home addresses even of those employees whose names are known. Finally, all the foregoing difficulties are compounded by the more or less constant turnover in the employee complement of any employer.[13]

In sum, not only does knowledge of employee names and addresses increase the likelihood of an informed employee choice for or against representation, but, in the absence of employer disclosure, a list of names and addresses is extremely difficult if not impossible to obtain. Accordingly, as we have stated, we shall in the future regard an employer's refusal to make a prompt disclosure of this informa-

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[11] See, e.g., *The May Department Stores Co.*, 136 NLRB 797, 808, enforcement denied, 316 F.2d 797 (C.A. 6), in which, after some 20 months of organizational effort, the union possessed names and addresses of only 1250 out of approximately 3000 eligible voters.

[12] *Vent Control, Inc.*, 126 NLRB 1134 (layoff); *Otarion Listener Corp.*, 124 NLRB 880 (sick leave); *Channel Master Corp.*, 148 NLRB 1343 (leave of absence); *Brown Cigar Company*, 124 NLRB 1435, 1437, footnote 3 (military leave).

[13] See 88 Monthly Labor Review, 1022-1024 (August 1965).

tion as tending to interfere with prospects for a fair and free election.[14]

A requirement that all participants in an election contest have the opportunity to ascertain the names and addresses of the voters is not uncommon. Lists of registered voters in public elections are open to inspection and copying by the public.[15] When stockholders wish to participate in election contests (or other proxy contests), management either must provide them with the names and addresses of other stockholders or mail campaign material for them.[16] Any candidate for union office is entitled to

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[14] While we have discussed the importance of disclosure in the context of the typical case in which the employer and union are the parties engaged in communicating with the electorate, it should be noted that the requirement here imposed applies equally to the case in which an election has been directed upon a petition by an employee or group of employees who seek to decertify an existing bargaining representative or to rescind that representative's authority to enter into a union-security agreement of the sort otherwise authorized by Section 8(a)(3) of the Act. In these latter cases, the petitioning employees would be entitled to the names and addresses of their fellow employees as an aid in their efforts to communicate their arguments against continued union representation or continuance of an existing union-security agreement. Similarly, the union, as a party to the election, would be entitled to employees' names and addresses so as to communicate its position. In short, the disclosure requirement here adopted applies whenever a Board election has been scheduled and insures all parties to the election, whatever their viewpoint, of an opportunity to communicate with the electorate. The only exception is in the expedited election conducted pursuant to Section 8(b)(7)(C). In this situation, we believe that the time span between the direction of election and the conduct thereof is too brief, taking into account the time required for the employer to compile and file a list of names and addresses, for the union to be able to make any meaningful use of this information. Hence, in that limited situation, we do not require disclosure.

[15] 29 C.J.S. Elections § 50.

[16] 17 C.F.R. 240. 14a-7, 8.

have the union distribute his campaign literature to all members.[17]

We see no reason why similar opportunities should not be available in a representation election. As one thoughtful commentator has stated, "Since the opportunity for both sides to reach all the employees is basic to a fair and informed election, the reasons for requiring disclosure seem just as strong as those leading to similar requirements under other provisions of the law."[18]

While the rule we here announce is primarily predicated upon our belief that prompt disclosure of employee names and addresses is necessary to insure an informed electorate, there is yet another basis upon which we rest our decision. As noted (*supra*, p. 5), an employer is presently under no obligation to supply an election eligibility list until shortly before the election. The list, when made available, not infrequently contains the names of employees unknown to the union and even to its employee supporters. The reasons for this are in large part the same as those that make it difficult for a union to obtain, other than from the employer, the names of all employees, i.e., large plants with many employees unknown to their fellows, employees on layoff status, sick leave, military leave, etc. With little time (and no home addresses) with which to satisfy itself as to the eligibility of the "unknowns", the union is forced

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[17] 73 Stat. 532, 29 U.S.C. § 481(c).

[18] Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 99-100 (1964); cf. Summers, *Judicial Regulation of Union Elections*, 70 Yale L. J. 1221, 1227-1228 (1961). Another manifestation of the concept that all participants in an election should have access to the electorate is embodied in 48 Stat. 1088, as amended, 47 U.S.C. § 315(a), which provides for equal time for political candidates on radio and television.

either to challenge all those who appear at the polls whom it does not know or risk having ineligible employees vote. The effect of putting the union to this choice, we have found, is to increase the number of challenges, as well as the likelihood that the challenges will be determinative of the election, thus requiring investigation and resolution by the Regional Director or the Board. Prompt disclosure of employee names as well as addresses will, we are convinced, eliminate the necessity for challenges based solely on lack of knowledge as to the voter's identity. Furthermore, *bona fide* disputes between employer and union over voting eligibility will be more susceptible of settlement without recourse to the formal and time-consuming challenge procedures of the Board if such disputes come to light early in the election campaign rather than in the last few days before the election when the significance of a single vote is apt to loom large in the parties' calculations. Thus, the requirement of prompt disclosure of employee names and addresses will further the public interest in the speedy resolution of questions of representation.

The arguments against imposing a requirement of disclosure are of little force, especially when weighed against the benefits resulting therefrom. Initially, we are able to perceive no substantial infringement of employer interests that would flow from such a requirement. A list of employee names and addresses is not like a customer list, and an employer would appear to have no significant interest in keeping the names and addresses of his employees secret (other than a desire to prevent the union from communicating with his employees—an interest we see no reason to protect). Such legitimate interest in secrecy as an em-

ployer may have is, in any event, plainly outweighed by the substantial public interest in favor of disclosure where, as here, disclosure is a key factor in insuring a fair and free election. Cf. *N.L.R.B.* v. *F. W. Woolworth Co.*, 352 U.S. 938, reversing *per curiam*, 235 F.2d 319 (C.A. 9); *N.L.R.B.* v. *Truitt Manufacturing Co.*, 351 U.S. 149; *F.C.C.* v. *Schreiber*, 381 U.S. 279.

The main arguments that have been presented to us by the Employers and the *amici curiae* supporting the Employers relate not to any infringement of *employer* rights flowing from a disclosure requirement but rather to an asserted infringement of *employee* rights. Thus, it is argued that if employees wished an organizing union to have their names and addresses, they would present the union with that information. By compelling the employer to provide the union with information that the employees have chosen not to divulge, the Board, it is asserted, compels employer interference with the Section 7 right of employees to refrain from union activities. We regard this argument as without merit. An employee's failure to provide a union with his name and address, whether due to inertia, fear of employer reprisal, or an initial predisposition to vote against union representation, is not, as we view it, an exercise of the Section 7 right to refrain from union activity. Rather, in the context with which we are here concerned—a Board-conducted representation election—an employee exercises this right by voting for or against union representation.

Similarly, we reject the argument that to provide the union with employee names and addresses subjects employees to the dangers of harassment and coercion in their

homes. We cannot assume that a union, seeking to obtain employees' votes in a secret ballot election, will engage in conduct of this nature; if it does, we shall provide an appropriate remedy.[19] We do not, in any event, regard the mere possibility that a union will abuse the opportunity to communicate with employees in their homes as sufficient basis for denying this opportunity altogether. See *Martin* v. *City of Struthers,* 319 U.S. 141; *Staub* v. *City of Baxley,* 355 U.S. 313.[20]

The argument is also made (by the Employer in the *Excelsior* case) that under the decisions of the Supreme Court in *N.L.R.B.* v. *Babcock & Wilcox*[21] and *N.L.R.B.* v. *United Steelworkers (Nutone, Inc.),*[22] the Board may not

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[19] See *Poinsett Lumber & Mfg. Co.,* 116 NLRB 1732; *Orleans Mfg. Co.,* 120 NLRB 630, 634; *Plant City Welding and Tank Company,* 119 NLRB 131, 133-134.

[20] Another argument made against disclosure of employee names and addresses in connection with an election proceeding is that a union might petition for an election with no real intention of participating therein, but solely to obtain employee names and addresses, intending, on receipt thereof, to withdraw the election petition and utilize its newly-acquired information as a basis for further organizational efforts. We think that the likelihood of such misuse of the Board's processes is minimized by our practice of requiring at least a 30 percent showing of representation before further processing the usual RC (union) petition, and also by our practice of imposing (absent a showing of good cause to the contrary) a 6-month ban on entertaining an election petition filed by a union which has withdrawn from an election after a hearing has been held or a consent-election agreement approved by the Regional Director. See *Campos Dairy Products, Ltd.,* 107 NLRB 715. In any event, in view of the importance of disclosure for a fair and free election, we do not regard the bare possibility that *some* unions may misuse the information disclosed as grounds for our denying *all* unions (as well as employees who seek to unseat unions, see footnote 14, *supra*) access to employee names and addresses.

[21] 351 U.S. 105.

[22] 357 U.S. 357.

require employer disclosure of employee names and addresses unless, in the particular case involved, the union would otherwise be unable to reach the employees with its message. We disagree. We think that the issue presented by these cases is distinguishable from that presented in *Babcock* or *Nutone* and that, even assuming the availability of other avenues by which a union *might* be able to communicate with employees, we may properly require employer disclosure of employee names and addresses so as to *insure* the opportunity of all employees to be reached by all parties in the period immediately preceding a representation election.

Initially, as we read *Babcock* and *Nutone,* the existence of alternative channels of communication is relevant only when the opportunity to communicate made available by the Board would interfere with a significant employer interest—such as the employer's interest in controlling the use of property owned by him. Here, as we have shown, the employer has no significant interest in the secrecy of employee names and addresses. Hence, there is no necessity for the Board to consider the existence of alternative channels of communication before requiring disclosure of that information. Moreover, even assuming that there is some legitimate employer interest in non-disclosure, we think it relevant that the subordination of that interest which we here require is limited to a situation in which employee interests in self-organization are shown to be substantial. For, whenever an election is directed (the precondition to disclosure) the Regional Director has found that a real question concerning representation exists; when the employer consents to an election, he has impliedly

admitted this fact.[23] The opportunity to communicate on company premises sought in *Babcock* and *Nutone* was not limited to the situation in which employee organizational interests were substantial, i.e., in which an election had been directed; we think that on this ground also the cases are distinguishable. Finally, both *Babcock* and *Nutone* dealt with the circumstances under which the Board might find an employer to have committed an unfair labor practice in violation of Section 8 of the Act, whereas the instant cases pose the substantially distinguishable issue of the circumstances under which the Board may set aside an election. "[T]he test of conduct which may interfere with the 'laboratory conditions' for an election is considerably more restrictive than the test of conduct which amounts to interference, restraint, or coercion which violates Section 8(a)(1)."[24] Whether or not an employer's refusal to disclose employee names and addresses after an election is directed would constitute "interference, restraint, or coercion" within the meaning of Section 8(a)(1) of the Act, despite the existence of alternative channels of communication open to the union, is a question on which we express no view because it is not before us. However, we are per-

[23] Section 9(c)(1), NLRA; see, also, Rules and Regulations and Statements of Procedure of the National Labor Relations Board, Sec. 101.18, 29 C.F.R. 101.18. We also require disclosure when an election is directed pursuant to an employee petition to decertify a currently recognized union or to rescind the authority of such a union to enter into a "union-shop" agreement. See footnote 14, *supra*. In these situations, the employee interest, though opposed to union representation or membership, is also required to be substantial before an election will be directed. See Section 9(c)(1)(A)(ii), 9(e)(1), NLRA; Rules and Regulations and Statements of Procedure of the National Labor Relations Board, Section 101.18, 101.27, 29 C.F.R. 101.18, 101.27.

[24] *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786-1787; see also *General Shoe Corporation*, 77 NLRB 124, 126-127.

suaded, for the reasons previously stated, that disclosure is one of the "safeguards necessary to insure the fair and free choice of bargaining representatives by employees"[25] and that an employer's refusal to disclose, regardless of the existence of alternative channels of communication, tends to interfere with a fair and free election. Thus *Babcock* and *Nutone,* which dealt with the substantially different issue of whether the employers' conduct violated Section 8(a)(1), are, for this reason also, inapposite.

Finally, we wish to state our reasons for rejecting the approaches to the disclosure issue suggested by questions II and III in the Notice of Hearing. We do not limit the disclosure requirement to the situation in which the employer has mailed antiunion literature to employees' homes (question II) because we believe that access to employee names and addresses is fundamental to a fair and free election regardless of whether the employer has sent campaign propaganda to employees' homes.[26] We do not limit the requirement of disclosure to furnishing employee names and addresses to a mailing service (question III) because this would create difficult practical problems and because we do not believe that the union should be limited to the use of the mails in its efforts to communicate with the entire electorate.[27]

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[25] *N.L.R.B.* v. *A. J. Tower Co.,* 329 U.S. 324, 330; see also *N.L.R.B.* v. *Waterman Steamship Corp.,* 309 U.S. 206, 226.

[26] Compare *May Department Stores Co.,* 136 NLRB 797, enforcement denied, 316 F.2d 797 (C.A. 6); *Montgomery Ward & Co.,* 145 NLRB 846, enfd. in part, 339 F.2d 889 (C.A. 6).

[27] See *S. & H. Grossinger's, Inc.,* 156 NLRB No. 20. See, also Eldersveld and Dodge, "Personal Contact or Mail Propaganda: An Experiment in Voting Turnout and Attitude Change" in Katz, *Public Opinion and Propaganda,* 532, 541 (1954); Karsh, *Diary of a*

Opinion of National Labor Relations Board in
Excelsior Underwear, Inc., *156 N.L.R.B. 1236 (1966)*

Inasmuch as the rule we have here announced is to be applied prospectively only (see footnote 5, *supra*), we reject Petitioners' exceptions to the Regional Directors' recommendations with respect to Objection No. 2 in both *Kellogg* and *Excelsior*. As we have also rejected the Petitioner's remaining exceptions in *Excelsior*, we shall accept the Regional Director's recommendation and certify the results of that election. With respect to *Kellogg*, while we have rejected the Joint Petitioners' exception to the Regional Director's recommendation as to Objection No. 2, the Employer has filed exceptions to the Regional Director's recommendation that the election be set aside on the basis of two campaign letters sent by the Employer and that a new election be directed. We have read the letters of the Employer in their entirety and the Union's propaganda and conclude that, under all the circumstances, the Employer's letters could clearly be evaluated by the employees as partisan electioneering and do not warrant setting the election aside.[28] Accordingly, we shall also certify the results of that election.

Strike 106 (1958); Klapper, *The Effects of Mass Media*, pt. 2, pp. 9-14 (1949).

In the briefs and arguments of the Employers and *amici curiae* supporting the Employers, much has been made of Board decisions setting aside representation elections because an employer or his agents called upon all or a majority of employees in their homes in the period preceding the election. See, e.g., *Peoria Plastic Co.*, 117 NLRB 545. The argument is made that it would be inequitable for the Board to preclude employers from visiting employees in their homes and at the same time insist that unions be furnished with employee names and addresses so that they may engage in home visits. The short answer to this argument is that employers are free to communicate with their employees in the plant; a union, as a practical matter, is severely limited in its efforts at in-plant communications. See *Plant City Welding and Tank Co.*, 119 NLRB 131, 133-134; see, also, footnote 10, *supra*.

[28] Member Brown would accept the Regional Director's findings and recommendation.

Opinion of National Labor Relations Board in Excelsior Underwear, Inc., *156 N.L.R.B. 1236 (1966)*

CERTIFICATIONS OF RESULTS OF ELECTIONS

IT IS HEREBY CERTIFIED, in *Excelsior Underwear Inc. and Saluda Knitting Inc.,* Case No. 11-RC-1876, that a majority of the valid ballots has not been cast for Amalgamated Clothing Workers of America, AFL-CIO, and that the said labor organization is not the exclusive representative of the employees in the unit herein found appropriate, within the meaning of Section 9(a) of the National Labor Relations Act, as amended.

IT IS HEREBY CERTIFIED, in *K. L. Kellogg & Sons,* Case No. 21-RC-8955, that a majority of the valid ballots has not been cast for International Union of Operating Engineers, Local No. 3, AFL-CIO, and International Union of Operating Engineers, Local Union No. 12, AFL-CIO, and that said labor organizations are not the exclusive representative of the employees in the unit herein found appropriate, within the meaning of Section 9(a) of the National Labor Relations Act, as amended.

Dated, Washington, D. C.

FRANK W. MCCULLOCH, *Chairman*

JOHN H. FANNING, *Member*

GERALD A. BROWN, *Member*

HOWARD JENKINS, JR., *Member*

SAM ZAGORIA, *Member*

NATIONAL LABOR RELATIONS BOARD

[SEAL]

Statutes Involved

National Labor Relations Act, § 6, 29 U.S.C. § 156 (1964):

§ 156. Same; rules and regulations.

The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this subchapter.

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (Supp. III 1965-67):

§ 551. Definitions.

For the purpose of this subchapter—

* * *

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate of financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declara-

tory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

* * *

§ 553. Rule making.

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms of substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

National Labor Relations Act, § 11, 29 U.S.C. § 161 (1964):

§ 161. Investigatory powers of Board.

For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and

proper for the exercise of the powers vested in it by sections 159 and 160 of this title—

(1) Documentary evidence; summoning witnesses and taking testimony.

The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) Court aid in compelling production of evidence and attendance of witnesses.

In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United

States or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

* * *

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 946

BEECH-NUT LIFE SAVERS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

The instant petition raises two issues concerning the requirement promulgated by the Board in *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966), that employers must furnish to the Board the names and addresses of the employees eligible to vote in a representation election, which information the Board will then make available to all contestants in the election. Petitioner challenges the holding of the court below (1) that the *Excelsior* requirement is valid although promulgated in an adjudicatory proceeding rather

than under the rule-making procedures of the Administrative Procedure Act, and (2) that the Board could compel compliance with the *Excelsior* requirement through a subpoena enforcement proceeding in a federal district court. As petitioner notes (Pet. 5-6), both of these issues are presented in *National Labor Relations Board* v. *Wyman-Gordon Co.*, No. 463, this Term, in which certiorari was granted on November 12, 1968. Indeed, although there is a conflict among the circuits on the validity of the *Excelsior* rule regarding the manner of its adoption, that conflict exists only as a result of the First Circuit's decision in *Wyman-Gordon*, since the five other circuits which have considered the question—the Fourth, Fifth, Seventh and Ninth, and the Second here—have upheld the Board (see cases cited in the Board's brief in No. 463, p. 6).

There can be no dispute that the holding of the court below in the instant case is squarely contrary to that of the First Circuit in *Wyman-Gordon*.[1] Moreover, it seems plain that the issues raised are sufficiently important to warrant review by this Court, as is confirmed by the grant of certiorari in *Wyman-Gordon*. However, the Board believes that these issues will be adequately presented to the Court in *Wyman-Gordon*, and that petitioner points to no special circumstances in this case justifying its separate and additional consideration along with that

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[1] A copy of the Second Circuit's opinion in the instant case is included as Appendix B to the Board's brief in No. 463 (pp. 61-72).

case.[2] The Board has already filed its brief in *Wyman-Gordon*, and the Clerk has advised us that oral argument in that case is scheduled for the session commencing February 24, 1969. Thus, if certiorari is granted here at this late date the effect might well be to delay unnecessarily the resolution of the issues presented.[3] Accordingly, it is suggested that the Court should defer ruling on the instant petition until it decides *Wyman-Gordon*.

Respectfully submitted.

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DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

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National Labor Relations Board.

FEBRUARY 1969.

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[2] Moreover, in its petition for certiorari in *Wyman-Gordon* the Board called attention to the pendency of other similar cases, including the present one, but urged that there was no occasion to await their outcome (Petition in No. 463, p. 10, n.7), and the Court proceeded to grant certiorari.

[3] Petitioner of course is free to seek leave of the parties or this Court to file an *amicus* brief in *Wyman-Gordon*, pursuant to Rule 42(2) and (3) of the revised Rules of this Court.

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